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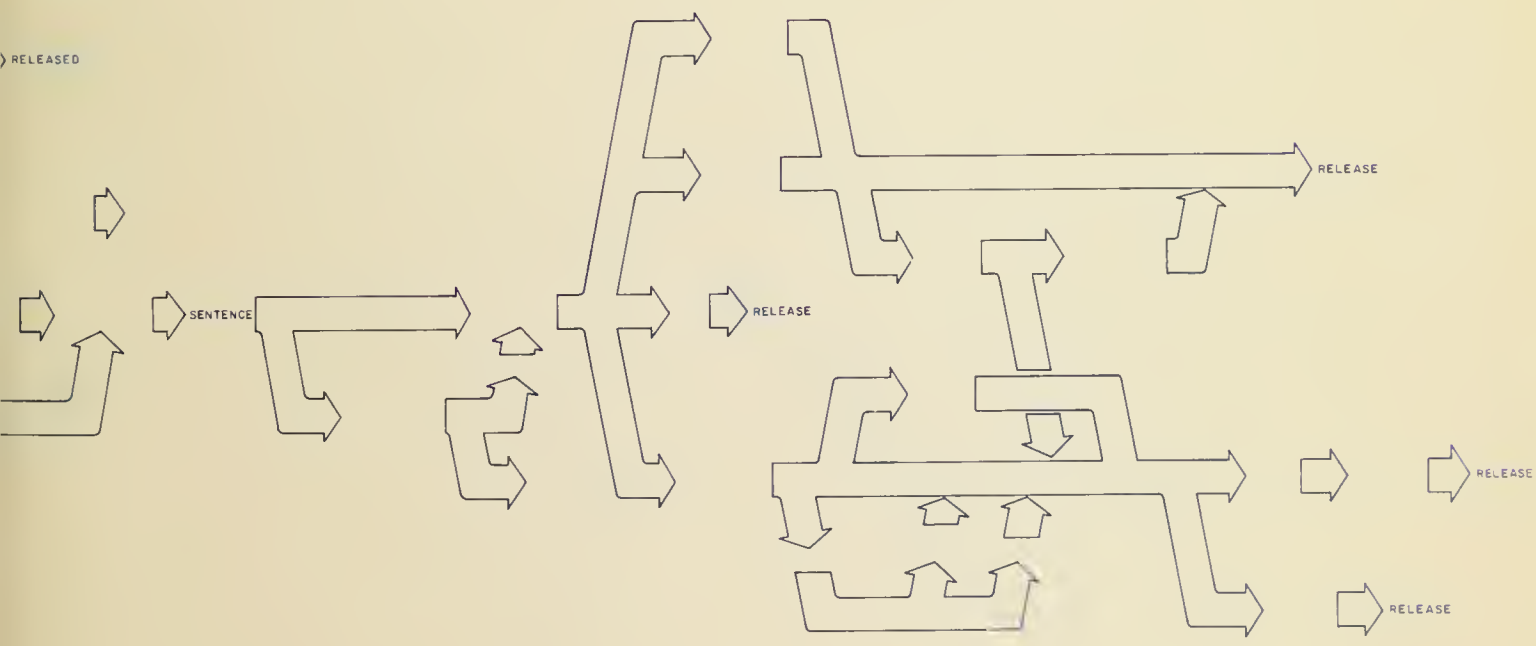
THE MONTANA JUSTICE PROJECT

FINAL REPORT

with PROPOSED LEGISLATION

1974-76

THE MONTANA COUNCIL ON CRIMINAL JUSTICE STANDARDS AND GOALS



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MONTANA JUSTICE PROJECT

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FORWARD

An enormous challenge faced the Montana Council on Criminal Justice Standards and Goals two years ago when it was established by Governor Thomas L. Judge. The task: To research, develop and adopt standards for the improvement of Montana's criminal justice system — police and sheriffs, prosecution and defense, judges and judicial systems, probation, parole, corrections, information systems and community involvement in crime prevention.

On several occasions, both the council and its task forces experienced concern and frustration that the task was simply too large in scope; that enough time was not available to cover the material carefully and in depth.

In most cases, however, the answers to problems were sufficiently clear and desirable to allow detailed and concise standards to be written. Our justice system will benefit when these standards and goals become a reality.

Our desire to write perfect standards was limited by an inability to achieve unanimous agreement or perfection. This is also one of our major strengths. The resulting standards and goals represent a consensus of opinion from a cross section of Montana citizens.

This volume, the sixth and last, attempts to spotlight those standards deemed most worthy of immediate implementation. It contains legislation which the council and task forces wish to be considered in 1977. It is brief. Supportive data, text and research may be found in task force reports, or obtained from the files of the Montana Board of Crime Control.

It is essential to the success of this project that all persons concerned with establishing these standards and goals continue to be individually involved with the efforts to make them operational in our state. I urge all Montanans to inform themselves by reading and evaluating this report and each task force report with the objective of using the material to improve the criminal justice system in our state.

/s/ Michael T. Greely
Chairman

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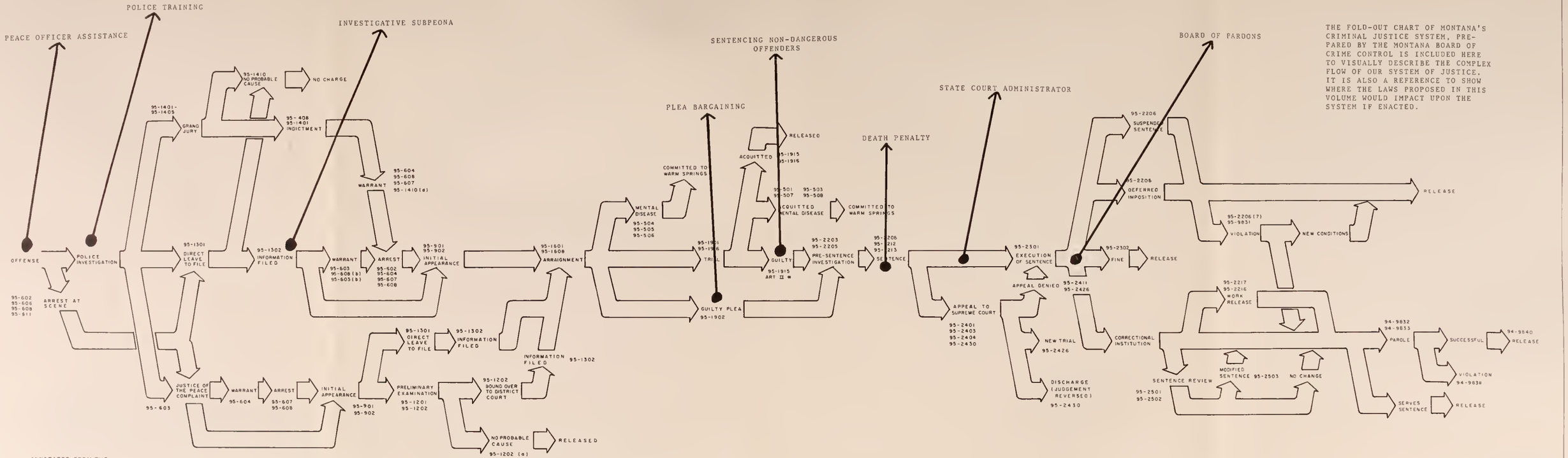

ANNOTATED FROM THE REVISED CODES OF MONTANA 1947

THE FOLD-OUT CHART OF MONTANA'S CRIMINAL JUSTICE SYSTEM, PREPARED BY THE MONTANA BOARD OF CRIME CONTROL IS INCLUDED HERE TO VISUALLY DESCRIBE THE COMPLEX FLOW OF OUR SYSTEM OF JUSTICE. IT IS ALSO A REFERENCE TO SHOW WHERE THE LAWS PROPOSED IN THIS VOLUME WOULD IMPACT UPON THE SYSTEM IF ENACTED.

MBCC
MONTANA BOARD OF CRIME CONTROL

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INTRODUCTION

Each task force submitted a list of priorities to the Council and suggested that these items receive immediate attention and implementation. Many of these priorities require action by the legislature.

The purpose of this report is to provide a convenient workbook for the legislature's use. Standards, draft legislation, research notes and brief background texts are provided. Most of the bills contained here were drafted by students at the Montana School of Law during 1976, and were reviewed and amended by a special subcommittee appointed by the council.

Editorial text has been cut to a minimum in this report, and the reader is referred to appropriate parts of task force reports for further explanation.

The appendix contains an abbreviated list of all standards and recommendations formally adopted by the council for Montana.

The Law Enforcement Task Force placed great emphasis upon peace officer professionalization. Four of its five priorities concern peace officer training and funding. The fifth priority calls for the creation of a much needed crime lab.

The Courts Task Force expressed great concern over the lack of a program in Montana to assist the victims of crime, but no legislation is proposed due to a study now being conducted by the Montana Board of Crime Control. Court-community relations, unification of the state court system, professionalism and standards to speed up the judicial process were the task force's other priorities.

The Corrections Task Force, as with the Courts Task Force, showed great concern for the need for a unified corrections system. It also placed high priority on diversion procedures, sentencing the non-dangerous offender, speeding up the trial process, and lastly, the need for better communications with the public concerning the workings of our corrections systems. This task force did not recommend a full-time board of pardons. After reviewing the task force's Standard 11.1 the Council amended it to require appointment of a full-time board.

The Information Systems Task Force did a tremendous amount of work only to find that its proposed legislation was not acceptable—even to members of the task force. In this difficult area of computerized information and intelligence, the members recognized and adopted the "standards" to be desired, but the "means" we must use to achieve those ends—laws, budgets and bureaus—were found to be impractical, costly, and, indeed, "frightening."

The Community Crime Prevention Task Force placed its highest priorities on community emergency services, citizen action councils, educational programs, the need for a code of ethics for public employees and officials and the need for increased alcohol and drug abuse treatment programs.

More than 300 standards and recommendations were adopted by the council. This material is contained in full in the task force reports, which have been widely distributed throughout the state. This volume highlights but 16 standards and 1 recommendation and urges that they receive immediate attention.

CHAPTER I

THE DEATH PENALTY AND SENTENCING IN MONTANA

MONTANA'S DEATH PENALTY

COUNCIL

RECOMMENDATION

MONTANA'S LEGISLATURE SHOULD IMMEDIATELY ENACT CONSTITUTIONALLY VALID DEATH PENALTY LAWS AND PROCEDURES.

Because of United States Supreme Court decisions handed down in July, 1976, doubt was cast as to whether Montana's death penalty statutes would pass the new test of constitutionality.

The Council has appendixed substantial research material which supports the following proposed bill.

See Appendix C.

BILL NO._____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR THE IMPOSITION OF THE DEATH PENALTY IN CERTAIN CASES; TO PROVIDE PROCEDURES AND REQUIREMENTS FOR THE AUTHORIZATION OF SUCH PENALTY; TO PROVIDE FOR A SEPERATE SENTENCING HEARING TO DETERMINE THE EXISTANCE OR NONEXISTANCE OF AGGRAVATING OR MITIGATING CIRCUMSTANCES; TO PROVIDE THAT THE DEATH PENALTY SHALL NOT BE IMPOSED UNLESS THE COURT FINDS ONE OR MORE OF THE AGGRAVATING CIRCUMSTANCES AND FINDS THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY; TO PROVIDE THAT THE DETERMINATION OF THE COURT SHALL BE SUPPORTED BY SPECIFIC WRITTEN FINDINGS OF FACT; TO PROVIDE FOR AUTOMATIC REVIEW OF A JUDGEMENT OF CONVICTION AND SENTENCE OF DEATH; AMENDING SECTION 94-5-102, R.C.M. 1947; AMENDING SECTION 94-5-303, R.C.M. 1947; REPEALING SECTION 94-5-105, R.C.M. 1947; AND REPEALING SECTION 94-5-304, R.C.M. 1947.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

There are ten (10) new R.C.M. sections that read as follows:

Section 1. Sentence of death -- hearing on imposition of death penalty. When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a seperate

sentencing hearing to determine the existance or non-existance of the circumstances set forth in section 3 and section 4 of this act for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

Section 2. Sentencing hearing -- evidence that may be received. In the sentencing hearing evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty. Any evidence the court deems to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

Section 3. Aggravating circumstances. Aggravating circumstances shall be the following:

(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison; or

(2) The offense was deliberate homicide and was committed by a defendant who was previously convicted of another deliberate homicide; or

(3) The offense was deliberate homicide and was committed by means of torture; or

(4) The offense was deliberate homicide and was committed by a person lying in wait or ambush; or

(5) The offense was deliberate homicide and was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person; or

(6) The offense was deliberate homicide and the victim was a peace officer killed while performing his duty.

(7) The offense was aggravated kidnaping which resulted in the death of the victim.

Section 4. Mitigating circumstances. Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity; or

(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; or

(3) The defendant acted under extreme duress or under the substantial domination of another person; or

(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; or

(5) The victim was a participant in the defendant's conduct or consented to the act; or

(6) The defendant was an accomplice in the offense committed by another person and his participation was relatively minor; or

(7) The youth of the defendant at the time of the crime; or

(8) any other fact in mitigation of the penalty.

Section 5. Consideration of aggravating and mitigating factors in determining sentence. In determining whether to impose a sentence of death or imprisonment the court shall take into account the aggravating and mitigating circumstances enumerated in section 3 and section 4 of this act and shall impose a sentence of death if the court finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

Section 6. Specific written findings of fact. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in section 3 and section 4 of this act. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

Section 7. Automatic review of sentence. The judgement of conviction and sentence of death shall be subject to automatic review by the supreme court of Montana as provided for in sections 8 through 10 of this act.

Section 8. Review of death sentence -- priority of review -- time for review. The judgement of conviction and sentence of death shall be subject to automatic review by the supreme court of Montana within sixty (60) days after certification by the sentencing court of the entire record

unless the time is extended by the supreme court of Montana for good cause shown. Such review by the supreme court of Montana shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

Section 9. Transcript and records of trial transmitted. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the supreme court of Montana.

Section 10. Supreme court to make determination as to the sentence. The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the judge's finding of the existence or nonexistence of statutory aggravating or mitigating circumstances as enumerated in section 3 and section 4 of this act; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

Section 11. Section 94-5-102, R.C.M. 1947, is amended to read as follows:

"94-5-102. Deliberate homicide. (1) Except as provided in section 94-5-103 (1) (a), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnaping, felonious escape or any other felony which involves the use or threat of physical force or violence against any individual.

(2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in ~~section 94-4-105~~ sections (insert R.C.M. section numbers assigned to sections 1 through 10 of this act), or by imprisonment in the state prison for any term not to exceed one hundred (100) years.

Section 12. Section 94-5-303, R.C.M. 1947, is amended to read as follows:

"94-5-303. Aggravated kidnaping. (1) A person commits the offense of aggravated kidnaping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by using or threatening to use physical force, with any of the following purposes:

(a) to hold for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function; or

(e) to hold another in a condition of involuntary servitude.

(2) A person convicted of the offense of aggravated kidnaping shall be punished by death as provided in ~~section 94-5-304~~ sections (insert R.C.M. section numbers assigned to sections 1 through 10 of this act), or be imprisoned in the state prison for any term not to exceed one hundred (100) years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for any term not to exceed ten (10) years."

Section 13. Section 94-5-105, R.C.M. 1947, is repealed.

Section 14. Section 94-5-304, R.C.M. 1947, is repealed.

- End -

SENTENCING

COUNCIL

RECOMMENDATION

THE LEGISLATURE SHOULD, AS SOON AS POSSIBLE, PROVIDE A MEANS FOR THE THOROUGH STUDY AND ANALYSIS OF MONTANA'S CRIMINAL SENTENCING PHILOSOPHY, PRACTICE AND PROCEDURE; TO STUDY THE CONCEPTS OF FIXED SENTENCING, MINIMUM AND MAXIMUM SENTENCING, INDETERMINANT SENTENCING, "FLAT TIME" SENTENCING, AND; TO DETERMINE THE EFFECTS WHICH "GOOD TIME" STATUTES, PAROLE ELIGIBILITY STATUTES AND THE PERSISTANT FELONY OFFENDER STATUTE HAVE UPON EXISTING SENTENCING PRACTICES.

The recommendation opposite expresses the council's concern about one of the most conflicting processes in the entire criminal justice system.

Solutions to our sentencing problems will not be easily found. The council urges the legislature to create and fund a mechanism (perhaps within the office of the governor or within the legislative council) which, within two years, will provide the legislative body with a comprehensive analysis of Montana's criminal sentencing philosophy, purpose and procedures with clear recommendations for change.

In particular, the council urges the legislature to examine the concept of "fixed" sentences.

An analysis prepared by Donald W. Molloy, Esq. titled "Sentencing: Alternatives to Montana's Code of Criminal Procedure" is also included as reference material in Appendix E.

Legislative efforts to study the practice of criminal sentencing should extend far beyond both of these documents.

See Appendix D & E.

See Appendix A for abbreviated description of standards and recommendations contained in all of the task force reports.

CHAPTER II

LAW ENFORCEMENT

LAW ENFORCEMENT

LAW ENFORCEMENT TASK FORCE REPORT CHAPTER TITLES:

- Training
- Forensic Science
- Selection
- Recruitment
- Education
- Planning and Organization
- Pay and Classification
- Juvenile Operations
- Position Statements

*See Appendix A for abbreviated description of standards and recommendations contained in all of the task force reports.

The Council on Criminal Justice Standards and Goals adopted 52 standards and recommendations submitted by the Law Enforcement Task Force. From these, five "high-priority" standards were selected for immediate implementation.

Three of the five priorities require legislative action.

1) Forensic Science System
2) Emergency Peace Officer Assistance
3) Funding Mandatory Police Training

The council felt obligated to assist the task force by drafting proposed bills for consideration by the 1977 legislature.

The first priority of the task force and the council concerns training. Standard 1.3 states:

> THE STATE OF MONTANA SHALL, BY 1978, PROVIDE FOR CONTINUED FULL FUNDING OF THE MONTANA LAW ENFORCEMENT ACADEMY.

Failure to appropriate adequate funding for the academy, located on the Montana State University campus, would jeopardize nearly all other efforts and programs aimed at providing the public with professional, competent peace officers.

In April, 1976, many newspapers carried the headlines "Dumb Cop' Image Target of Task Force."

As early as 1973, the legislature recognized this concern by mandating that all new officers should receive minimum basic training. It amended section 82A-1207 by adding:

"The board of crime control shall have the authority to establish minimum qualifying standards for employment of peace officers, required basic training for such officers, establish minimum standards for any law enforcement training schools administered by the state or any of its political subdivisions or agencies, to ensure the public health, welfare and safety."

The Montana Board of Crime Control has implemented this legislative mandate by creating the Peace Officers Standards and Training Advisory Council (P.O.S.T.).

P.O.S.T., in turn, now issues certificates of training to new officers who successfully complete basic training courses provided by the Law Enforcement Academy in Bozeman.

The academy is absolutely essential if such basic training is to continue.

Full funding of the academy will guarantee continuation of high quality basic training.

It is clearly a legislative duty (as opposed to local governments) to provide the funds to support its mandates, as expressed in the above Standard I.3.

MANDATED MINIMUM BASIC TRAINING AND FUNDING

STANDARD 1.1

ALL PEACE OFFICERS WITHIN THE STATE OF MONTANA SHALL HAVE SUCCESSFULLY COMPLETED THE MINIMUM BASIC PEACE OFFICER TRAINING COURSE AS ESTABLISHED BY THE PEACE OFFICER'S STANDARDS AND TRAINING ADVISORY COUNCIL PRIOR TO BEING SWORN AND EXERCISING THAT AUTHORITY.

STANDARD 1.2

THE STATE OF MONTANA SHALL REIMBURSE EVERY LAW ENFORCEMENT AGENCY 100 PERCENT OF THE SALARY IT PAID TO A PEACE OFFICER WHILE IN ATTENDANCE AT, AND UPON SUCCESSFUL COMPLETION OF, ANY STATE MANDATED AND REQUIRED TRAINING.

Considerable effort and money was spent by the Montana Justice Project during the last two years to obtain accurate public opinion about our criminal justice system. (Actual tally of polls taken are available at the Montana Board of Crime Control).

Almost all responses indicate frustration, alarm or anger at our judicial and correctional functions. A large majority of the public felt that law enforcement was doing a "fair" to "good" job. Many indicated the need for and (more significantly) the willingness to pay higher taxes for more and better trained law enforcement.

The task force and the council responded to this need by strengthening already existing statutes and regulations mandating minimum basic training.

The proposed bill will require all peace officers hired **after July 1, 1978,** to be trained prior to exercising police powers on the street. It also suggests a method to pay for such mandated training.

The funding method proposed involves fines to be imposed by our court system. Lower courts—both justices of the peace and municipal courts—already face confounding bookkeeping problems concerning fines collected and distributed. One judge on the council described himself as a "collection agency" for state operated programs. The council strongly recommends that the legislature study the fine collection and distribution procedures used in lower courts, and develop legislation which would alleviate these bookkeeping problems. One method suggested was the creation of one centralized agency to collect all fines imposed by the courts. This agency would then distribute the funds according to law and account for the same. In this way, courts would have but one bookkeeping entry—that it imposed a fine for a certain crime and forwarded same, in full, to the disbursing agency.

BILL NO._____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO REQUIRE ALL PEACE OFFICERS TO SUCCESSFULLY COMPLETE A MINIMUM BASIC PEACE OFFICERS TRAINING COURSE PRIOR TO EXERCISING ANY POWERS OF A PEACE OFFICER; TO PROVIDE FOR CERTIFICATES ATTESTING TO SUCCESSFUL COMPLETION OF THE COURSE OR A TRAINING PROGRAM OF SIMILAR CONTENT; TO PROVIDE FOR WAIVER OF THESE REQUIREMENTS; TO PROVIDE FOR THE APPOINTMENT OF TEMPORARY PEACE OFFICERS: TO ESTABLISH A PEACE OFFICER'S TRAINING FUND; TO PROVIDE FOR FUNDING OF SAME; TO PROVIDE FOR REIMBURSEMENT OF THE SALARY PAID BY A LAW ENFORCEMENT AGENCY TO A PEACE OFFICER WHILE IN ATTENDANCE AT, AND SUCCESSFULLY COMPLETING THE REQUIRED TRAINING."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Peace officer training -- training necessary prior to exercising power of a peace officer -- waiver of requirements.

(1) For the purpose of this act the term "peace officer shall mean the undersheriffs and deputy sheriffs of each county, the members of the police force of every city, municipality or town and the marshalls of every town. This term shall not include employees of state government law enforcement agencies or any temporary, reserve, auxiliary, special, or part time police officers or deputy sheriffs.

(2) Any peace officer who is first employed after July 1, 1978, for the purposes of the prevention of crime and the general enforcement of the criminal laws of this state, shall successfully complete the Minimum Basic Peace Officer Training Course as established by the Montana Board of Crime Control before exercising the powers of a peace officer.

(3) A certificate shall be awarded to a peace officer upon successful completion of the certified Basic Training Course.

(4) These requirements may be waived by the Montana Board of Crime Control upon showing of proper proof that the officer has successfully completed such required training and education programs; has successfully completed equivalent training and education programs as determined by the Montana Board of Crime Control; or if by reason of extensive prior law enforcement experience the basic training requirement is deemed to be unnecessary.

Section 2. Temporary peace officers -- procedures necessary for appointment.

(1) The chief executive of a police department or the sheriff may appoint temporary peace officers when through some unforeseen occurrence or because of training requirements, temporary peace officers are required.

(2) The temporary officers may be retired peace officers, sworn reserve officers, or peace

officers from another law enforcement agency.

(a) The term shall not exceed 30 days without the consent of the governing body.

(b) In no event shall a temporary officer serve for a term to exceed six months.

Section 3. Peace officer's training fund -- funding -- salaries paid during attendance reimbursed.

(1) There is hereby established a Peace Officers' Training Fund, to be administered within the budget of the Montana Law Enforcement Academy.

(2) All courts of the State of Montana shall forward $1.00 of every fine or forfeited bond to the budget administrator of the Montana Law Enforcement Academy. However, no such assessment shall be made against any person convicted for violation of any state statute, municipal ordinance, or county ordinance relating to the parking of vehicles.

(3) The budget administrator of the Montana Law Enforcement Academy shall reimburse an employing law enforcement agency one hundred per cent (100%) of the salary it paid to a peace officer while attending any state mandated and required training course.

(4) The Basic Training Course shall consist of at least two hundred and eighty (280) hours of instruction and must have been successfully completed by the peace officer before any such reimbursement shall be made.

- End -

RESEARCH NOTATION

MANDATED POLICE TRAINING AND FUNDING

The Law Enforcement Task Force suggested that one method of funding training was to add a "penalty" to each traffic citation.

The case of **Sanders v. Butte,** 151 Montana 1, 441 P2d 190 (1968), casts a constitutional cloud over this method of funding. The Sanders case held unconstitutional a statute providing for a penalty assessment on **bail** for the drivers' education program. California also held **bail** assessments to be unconstitutional.

The issue then is whether an assessment added to a "fixed fine"' would also be unconstitutional in Montana. California and Florida have ruled that assessments to a fine are constitutional. **Hensley v. Peace Officers Training Fund, 99 Cal. Rpt. 728 (1972) McDermott v. San Francisco, 493 P2d 11 61, Young v. Florida,** 238 So 2d 589, 400 U. S. 962 (1970).

MONTANA FORENSIC SCIENCE SYSTEM

STANDARD 2.1

THE STATE OF MONTANA SHALL, BY 1978, ENACT LEGISLATION ESTABLISHING A DIVISION OF FORENSIC SCIENCE IN THE DEPARTMENT OF JUSTICE.

STANDARD 2.2

A BOARD OF FORENSIC SCIENCE SHALL BE APPOINTED BY THE GOVERNOR FOR A TWO YEAR TERM AFTER WHICH IT SHALL BE ABOLISHED. THE BOARD SHALL ESTABLISH A LABORATORY OF CRIMINALISTICS AND AN OFFFICE OF FORENSIC PATHOLOGY; SET PROCEDURES FOR HIRING ALL NECESSARY PERSONNEL; ESTABLISH POLICY; AND, DEVELOP ALL NECESSARY PROCEDURES FOR THE DIVISION OF FORENSIC SCIENCE.

STANDARD 2.3

THE LABORATORY OF CRIMINALISTICS SHALL PERFORM THE TIMELY AND EFFICIENT ANALYSIS AND PROCESSING OF PHYSICAL EVIDENCE SUBMITTED BY ALL MONTANA STATE, COUNTY AND MUNICIPAL LAW ENFORCEMENT AGENCIES

STANDARD 2.4

THE OFFICE OF FORENSIC PATHOLOGY SHALL BE HEADED BY THE STATE MEDICAL EXAMINER WHO SHALL DETERMINE THE CAUSE OF CERTAIN TYPES OF DEATHS WITHIN THE STATE OF MONTANA BY INVESTIGATION AND EXAMINATION AND SHALL PROVIDE REPORTS, INCLUDING COURT TESTIMONY, CONCERNING SUCH INVESTIGATION, EXAMINATION AND ANALYSIS WHEN IN THE PUBLIC INTEREST.

Forensic science involves the collection, retention and analysis of crime scene evidence. It uses physical evidence to reconstruct a crime, and to connect or eliminate a suspect with that crime.

It includes the examination of hair, cloth fiber, blood, paint, soil, firearms, tool marks, poisons, seminal stains and a nearly infinite variety of other materials.

It is the controlled use of scientific knowledge and skill to determine the truth—thereon to provide justice.

Montana now has the population, and, unfortunately, the amount of crime, which justifies the expense of a forensic science system.

Nearly 30,000 serious felonies were commited in Montana during 1974 (murder, rape, robbery, burglary, assault, larceny-theft, car theft). Many of these crimes remain unsolved because scientific examination of crime evidence is neither timely nor readily available to law enforcement.

The proposed legislation divides the establishment of a forensic science system into two distinct phases:

1) development
2) operation

SUNSET CLAUSE

The task force concluded that the most workable and logical approach would be to create a board of forensic science to develop a specific system for Montana. When the system is designed, the board will be abolished, and the function will be transferred to the Department of Justice.

This temporary (two-year) board would:

determine structural and equipment needs,

hire a chief medical examiner,

hire a laboratory director,
establish a budget, and
set policies and procedures.

The drug analysis laboratory in Missoula will be of immediate importance to this board. Those services and equipment must be incorporated into any plan for a new forensic facility. In addition, the board must decide where these facilities will be located.

Law enforcement is concerned that the existing drug analysis lab in Missoula may, somehow, be neglected or forgotten during the process of establishing a comprehensive forensic science system. That must not be allowed to happen.

Also included is our best guess at the cost of passing this legislation. The effort will be expensive now and even more costly in the future. That item alone has killed this bill in past legislatures. Hopefully, it will not do so again.

Greater explanation and justification may be found in the "Law Enforcement Report" at pages 47-68 and pages 223-229.

BILL NO._____

INTRODUCTED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT CREATING IN THE DEPARTMENT OF JUSTICE A LABORATORY OF CRIMINALISTICS AND MEDICAL EXAMINERS OFFICE; PROVIDING FOR ITS ADMINISTRATION, DUTIES AND FUNCTION; ALTERING THE DUTIES OF THE CORONER; AND REPEALING SECTIONS 16-3403, 16-3405, 16-3409, 95-801, 95-802, 95-810 and 95-814, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. This act shall be known as the Montana Forensic Science System Act.

Section 2. The purpose of this act is to provide the personnel, facilities and procedures to determine the cause of certain types of deaths by investigation and examination as are in the public interest; to analyze specimens for law enforcement offices, and to provide reports, including court testimony, concerning such investigation, examination and analysis when in the public interest.

Section 3. There is a division of forensic science, allocated to the Department of Justice for administrative purposes only. However, section 82A-108 (2)(d) does not apply, and the division may hire its own personnel.

(1) The division head is an administrator whose title is state medical examiner, to be appointed by the Board of Forensic Science. The administrator shall be a forensic

pathologist qualified or certified by the American Board of Pathologists of the American Medical Association.

(2) The functions of the division include a laboratory of criminalistics and an office of forensic pathology.

Section 4. The Board of Forensic Science shall be established by the governor and composed of not more than fifteen (15) members. The board shall be representative of state and local law enforcement agencies, units of general local government, and the medical profession, and shall include:

(1) One (1) member to be the chairman of the Peace Officers Standards and Training Advisory Council.

(2) One (1) member to be an incumbent chief of police recommended by the Montana Chiefs of Police Association.

(3) One (1) member to be an incumbent sheriff recommended by the Montana Sheriffs and Peace Officers Association.

(4) One (1) member to be a duputy sheriff recommended by the Montana Sheriffs and Peace Officers Association.

(5) One (1) member to be a police officer recommended by the Montana Police Protective Association.

(6) One (1) member to be recommended by the chief of the Montana Highway Patrol.

(7) One (1) member to be recommended by the State Fish and Game Director

(8) One (1) member to be recommended by the state attorney general.

(9) One (1) member to be an incumbent mayor recommended by the Montana League of Cities and Towns.

(10) One (1) member to be an incumbent county commissioner recommended by the Montana Association of Counties.

(11) One (1) member to be a prosecuting attorney recommended by the Montana Association of County Attorneys.

(12) One (1) member to be a medical doctor.

(13) One (1) member to be a medical pathologist.

(14) One (1) member to possess a graduate degree in one of the forensic sciences, and

(15) One (1) member to be a county coroner.

Section 5. The Board of Forensic Science shall establish a laboratory of criminalistics, provide procedures consistent with this act for the hiring and employing of all necessary personnel, establish policy, and set all necessary procedures for the functioning of the Division of Forensic Science.

All necessary functions of the board shall be completed within a two (2) year period of time after its establishment and at termination the board shall be abolished.

Section 6. The laboratory's purpose shall be to perform analysis of specimens submitted by all Montana state, county, or city law enforcement officers, all state agencies, and referral specimens from other states or agencies if accepted by the laboratory director. The laboratory shall charge reasonable fees for its performance of such services; except that it shall not charge county, city or municipal law enforcement officers or coroners of this state for such services.

Section 7. The laboratory's functions shall include analysis of toxicologic and criminalistic specimens which are deemed to be within its performance capability as determined by the director.

Section 8. The laboratory director shall be responsible to the division head for supervision and direction of the laboratory, and shall assume the duties of appointing laboratory personnel, rendering decisions as to the disposition of specimens, and perform all other duties required by the regulations of the division.

Section 9. The duties of the chief medical examiner shall include the following:

(1) He shall provide assistance and consultation to associate medical examiners, coroners and law enforcement officers, and provide court testimony when necessary to accomplish the purposes of this act.

(2) He shall stimulate and direct research in the field of forensic pathology.

(3) He shall maintain an ongoing educational and training program for associate medical examiners, coroners and law enforcement officers.

Section 10. The chief medical examiner shall appoint the director of the laboratory of criminalistics with approval of the Board of Forensic Science.

(1) The chief medical examiner may appoint one or more associate medical examiners.

(2) Such associate medical examiners shall serve at the pleasure of the chief medical examiner.

(3) Associate medical examiners must be physicians licensed to practice in Montana.

(4) In addition to the above appointments, the division head may appoint an administrative assistant to handle the administrative duties as directed by the division head.

Section 11. Associate medical examiners may engage in the private practice of medicine.

Section 12. Associate medical examiners shall be paid for their services an amount which the chief medical examiner certifies to be a reasonable compensation therefore and shall be reimbursed for expenses actually incurred in the performance of their duties. Such costs shall be chargeable to the county for which the service is performed.

Section 13. When in the state of Montana any person shall die of: (a) criminal violence, (b) by accident, (c) suddenly, when in apparent good health, (d) by suicide, (e) when unattended by a practicing physician, (f) in any prison on penal institution, (g) when in police custody, (h) in any suspicious or unusual circumstances, (i) by criminal abortion, (j) by poison, (k) by disease constituting a threat to public health, (l) by disease or injury or toxic agent resulting from employment, (m) when a dead body is brought into Montana without proper medical certification, or (n) when a body is to be cremated or dissected, the coroner of the county in which death occurred or the body was found shall make or have performed such investigation or examination as he shall deem necessary or as shall be

requested by the attorney general or the county attorney to ascertain the cause and manner of death. After his initial examination and investigation the coroner shall immediately prepare a written report of his findings in duplicate, retain one (1) copy for his files, and provide a copy to the chief medical examiner. The chief medical examiner shall have authority in any case coming under any of the above categories, to perform or have performed an autopsy or whatever laboratory examinations he deems necessary in the public interest.

Section 14. No criminal or civil action shall arise against a medical examiner for performing an autopsy authorized by this act.

Section 15. Any property found with or upon the person of the deceased which is not needed as evidence shall be turned over by the medical examiner or the coroner to the appropriate public administrator, to be held until disposed of according to law. Any property needed as evidence shall be turned over to the appropriate investigative authority.

Section 16. When a medical examiner or coroner takes possession of a body of a deceased person for purposes of examination, and no other person claims the body, the coroner of the county in which the death occurred or the body was found shall cause it to be decently interred; and if there is not sufficient property belonging to the estate of the deceased to pay the necessary expenses of burial, the expenses are a legal charge against the county.

Section 17. The coroner, with approval of the county commissioners, may appoint one (1) or more deputy coroners to assist him or act in his absence. Such deputy may be the coroner from another county.

Section 18. It is the duty of any person who becomes aware of the death of any other person occurring under the circumstances described in Section 13 of this act to report such death and circumstances immediately to the coroner. Upon receipt of such notification, the coroner shall immediately examine or otherwise take charge of the dead body.

Any person who willfully fails to report or conceals such death and circumstances, or who refuses to make available prior medical or other information pertinent to the death investigation, or who without an order from the coroner or state medical examiner, willfully touches, removes or disturbs the body, the clothing, or any article upon or near the body with the intent to alter the evidence or circumstances surrounding the death shall be guilty of a misdemeanor, and upon conviction be subject to imprisonment in the county jail for not more than one (1) year or a fine of not more than one thousand dollars ($1,000), or both fine and imprisonment.

Section 19. When the cause of death has been established within reasonable medical certainty by the chief medical examiner or associate medical examiner, whether by review of the coroner's report or by his own examination, he shall make available to the county attorney in writing his determination as to the cause of death.

Section 20. Copies of records and detailed findings of autopsy and laboratory investigations shall be maintained by the state medical examiners office.

Section 21. Any evidence or specimen coming in the possession of the coroner or state medical examiner in connection with any investigation or autopsy may be retained by him or delivered to any law enforcement officer assigned to the investigation of the death.

Any evidence material to the determination of the cause of death in possession of the law enforcement officers assigned to the investigation of the death shall be made available to the medical examiner and the county coroner.

It is the duty of the county attorney to immediately establish and maintain liaison with the state medical examiner, coroner, and law enforcement investigating agency during the investigation into the cause of death.

Section 22. The chief medical examiner and the laboratory director may be removed from office only for neglect of duty, incompetency or other good cause, and after full hearing on verified charges filed at least twenty (20) days before said hearing and served upon said person at least twenty (20) days before said hearing.

Section 23. The Division of Forensic Science is authorized to accept federal and other moneys which may be made available to the Board of Crime Control by the federal government or others to be used to accomplish the purposes of this act.

Section 24. The Board of Forensic Science is authorized to adopt and promulgate any or all of the regulations deemed

necessary to accomplish the purposes of this act.

Section 25. Sections 16-3403, 16-3405, 16-3409, 95-801, 95-802, 95-810 and 95-814, R.C.M. 1947, are repealed.

- End -

DIVISION OF FORENSIC SCIENCE
PROPOSED ADMINISTRATIVE BUDGET
FISCAL YEARS 1978 AND 1979

PERSONNEL SERVICES	1978	1979
Salaries		
Chief Medical Examiner (Grade 22)	$ 31,570.00	$ 33,149.00
Laboratory Director (Grade 20)	26,229.00	26,572.00
Administrative Assistant (Grade 17)	19,868.00	20,211.00
Secretary (Grade 7)	7,875.00	8,061.00
Secretary (Grade 7)	-0-	7,875.00
Total Salaries	$ 85,542.00	$ 95,868.00
Employee Benefits		
F.I.C.A. @ 5.85% of $58,275.00 and $66,336.00	$ 3,409.00	$ 3,721.00
PERS @ 6.00% of $85,542.00 and $95,868.00	5,133.00	5,752.00
Industrial Accident @ 2.85% of $31,570.00 and $33,149.00	900.00	945.00
Industrial Accident @ .65% of $46,097.00 and $46,783.00	299.00	304.00
Industrial Accident @ .30% of $7,875.00 and $15,936.00	24.00	48.00
Hospitalization @ $10.00 per month x 12 months	480.00	600.00
Unemployment	1,500.00	1,600.00
Total Benefits	$ 11,745.00	$ 12,970.00
Total Personnel	$ 97,287.00	$108,838.00

OPERATING EXPENSES		
Consultant and Professional Contracted Services		
6 Professional Advisors @ $100.00 per day x 3 days each	$ 1,800.00	
9 Professional Advisors @ $100.00 per day x 3 days each		$ 2,700.00
6 round trip airfares @ $250.00	1,500.00	
9 round trip airfares @ $250.00		2,250.00
18 days per diem @ $50.00	900.00	
27 days per diem @ $50.00		1,350.00
Total Consultant and Professional Services	$ 4,200.00	$ 6,300.00
Other Contracted Services		
1 mag-card typewriter @ $135.00 per month x 12 months	$ 1,620.00	$ 1,620.00
Central Payroll — 4 employees @ $1.00 per month x 12 months	48.00	
5 employees @ $1.00 per month x 12 months		60.00
Central Services for Accounting — disbursements, purchase orders, payrolls, and administrative costs @ $200.00 per month x 12 months	$ 2,400.00	$ 2,400.00

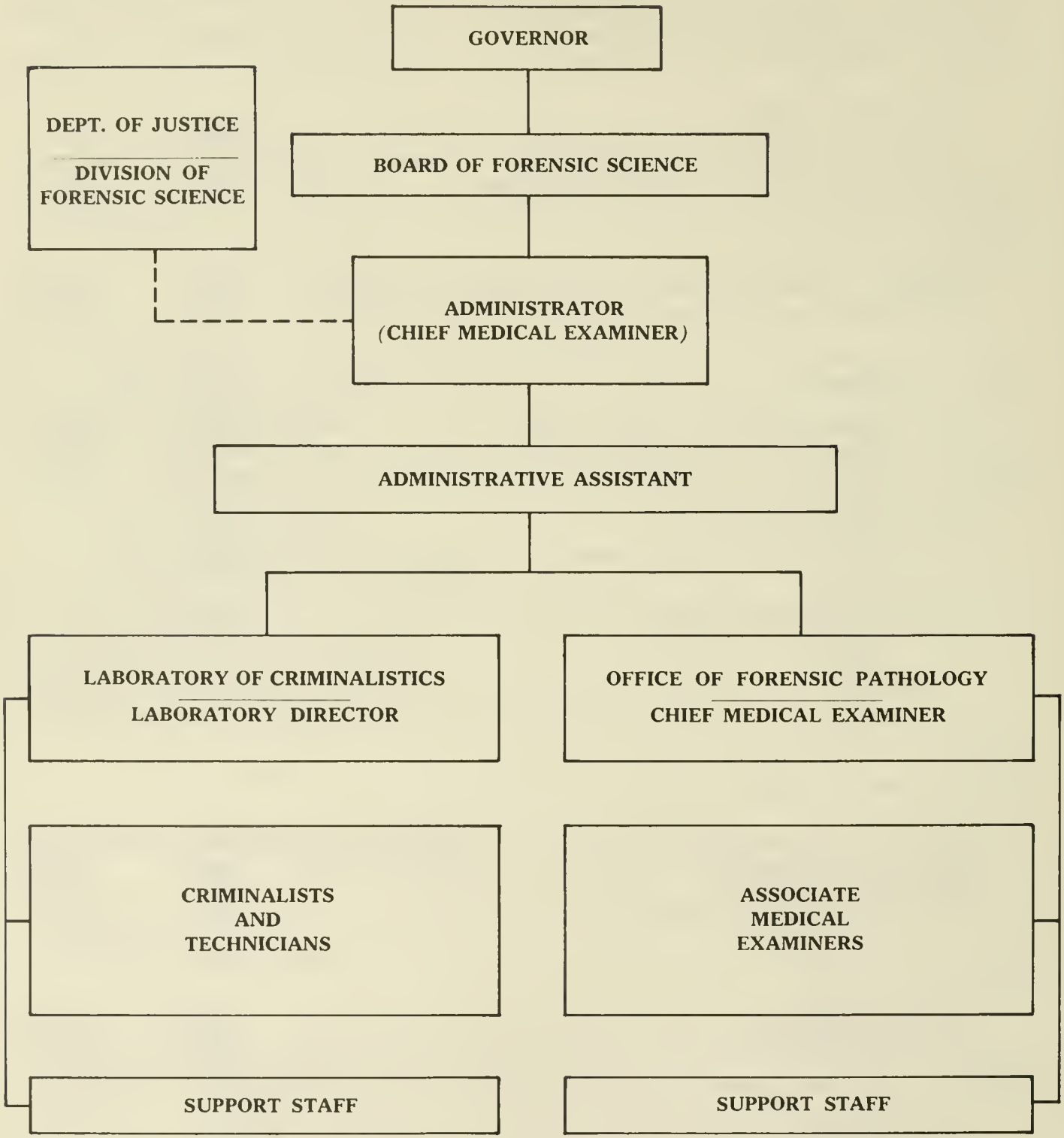
	1978	1979
Automobile Liability Insurance	100.00	120.00
Pro-rata document processing charge	200.00	250.00
Printing and duplicating — $200.00 per month x 12 months	2,400	
$300.00 per month x 12 months		3,600.00
Commercial printing (final report cover)		600.00
Total Other Contracted Services	$ 6,768.00	$ 8,650.00
Supplies and Materials		
Office — $100.00 per month x 12 months	$ 1,200.00	
$125.00 per month x 12 months		$ 1,500.00
Total Supplies and Materials	$ 1,200.00	$ 1,500.00
Capital Equipment		
3 executive desks @ $250.00	$ 750.00	
2 secretarial desks (1 "L-Shaped" @ $500 and	500.00	
1 standard @ $250.00)		250.00
3 executive chairs @ $150.00	450.00	
2 secretarial chairs @ $100.00	100.00	100.00
4 file cabinets, legal size with locks @ $115	230.00	230.00
1 coat rack, multiple hangars	140.00	
6 conference tables @ $100.00	600.00	
7 side chairs @ $75.00	525.00	
15 conference executive chairs @ $200.00	3,000.00	
1 I.B.M. Selectric typewriter with correcting feature		750.00
5 bookcases @ $80.00	320.00	
3 chalkboards, wall hanging, @ $35.00	105.00	
1 chalkboard, reversible on stand	80.00	
4 sets of shelving with brackets, 3 shelves each @ $20.00	80.00	
5 jiffy stands @ $50.00	250.00	
Total Capital Equipment	$ 7,130.00	$ 1,330.00

COMMUNICATION AND TRANSPORTATION

Telephone		
Installation charge	$ 200.00	
$150.00 per month x 12 months	1,800.00	$ 1,800.00
Postage and Mailing		
$65.00 per month x 12 months	780.00	
$85.00 per month x 12 months		1,000.00
Advertising — employment	500.00	
Total Communication and Transportation	$ 3,280.00	$ 2,800.00

	1978	1979
Travel — In-state		
Staff:		
3 travelers x 6 trips x 3 days @ $25.00 per day	$ 1,350.00	
3 travelers x 12 trips x 3 days @ $25.00 per day		$ 2,700.00
400 miles average per trip @ 15¢ per mile x 18	1,080.00	
400 miles average per trip @ 15¢ per mile x 36		2,160.00
Board of Forensic Science:		
15 members x 12 meetings x 3 days @ $25.00	13,500.00	
15 members x 18 meetings x 3 days @ $25.00		20,250.00
400 miles average per trip x 12 trips @ 15¢ per mile	7,200.00	
400 miles average per trip x 18 trips @ 15¢ per mile		10,800.00
Task Force:		
7 members (3 pathology and 4 laboratory) x 6 meetings x 2 days @ $25.00	2,100.00	2,100.00
400 miles average per trip x 6 trips x 7 members @ 15¢ per mile	2,500.00	2,500.00
Travel — Out-of-state		
Airfare @ $250.00 average x 6 trips x 2 staff	3,000.00	3,000.00
3 days per trip x 6 trips x 2 staff @ $50.00	1,800.00	1,800.00
Registration @ $200.00 x 2 of above trips	400.00	400.00
Applicant travel for interviews:		
6 applicants @ $200.00 airfare	1,200.00	
6 applicants x 3 days per diem @ $50.00	900.00	
Relocation Costs:		
Transportation @ $200.00 (family of 4)	800.00	
Personal belongings — transport	1,000.00	
Total Travel	$ 36,830.00	$ 45,710.00
Other Operational Expenses		
Rent		
1,500 square feet @ $6.00 per foot per year	$ 9,000.00	$ 9,000.00
Repairs and maintenance, office equipment and furniture	100.00	100.00
Utilities @ $200.00 per month	2,400.00	2,400.00
Janitorial service @ $100.00 per month	1,200.00	1,200.00
Educational supplies		
40 books @ $25.00	1,000.00	1,000.00
Subscriptions and dues	150.00	150.00
Total Other Operational Expenses	$ 13,850.00	$ 13,850.00
TOTALS	$170,545.00	$188,978.00
TWO YEAR TOTAL	$359,523.00	

DIVISION OF FORENSIC SCIENCE



RESEARCH NOTES

The proposed legislative bill developing a Forensic Science System for the State of Montana is the culmination of years of research and study by the Montana Board of Crime Control, the Montana Justice Project, numerous law enforcement representatives, criminal justice system professionals, and many interested businessmen and citizens. Literally hundreds of hours of research, investigation and study have been performed by these people in the interest of accomplishing this goal. Trips to other states have been undertaken to view their crime lab in operation; statistics have been gathered to assist in deciding whether Montana really needed a crime lab; many people, public and private alike, were interviewed to obtain their viewpoints on this need; high-level consultants were engaged to provide unbiased data; proposed bills were drafted in previous years and were presented to the legislature—all of which failed due to monetary considerations. It is highly evident from all the data compiled (which is available from the Montana Board of Crime Control) that there is no longer any doubt or misconceptions about the **need** for a forensic science system within the state of Montana. Once again we are right back to the question of money. The research indicates people **are** willing to pay more taxes for a better criminal justice system. The Forensic Science System is an absolutely necessary item in the cause of improving Montana's criminal justice system. It is felt by a vast majority of individuals who were contacted by this project, that if this attempt at establishing a forensic science system for Montana fails, then the whole concept of improving our criminal justice system will be, in no small way, stifled for many years to come.

ASSISTING A PEACE OFFICER

STANDARD 6.4

THE STATE OF MONTANA SHALL, BY 1978, ENACT LEGISLATION ENABLING PEACE OFFICERS TO RETAIN ALL THE PRIVILEGES AND IMMUNITIES FROM LIABILITY, ALL PENSION, INSURANCE, SALARY AND OTHER BENEFITS TO WHICH THEY ARE NORMALLY ENTITLED, WHEN RESPONDING TO, AND/OR PROVIDING ASSISTANCE TO, ANY OTHER PEACE OFFICER WHO HAS CALLED FOR ASSISTANCE.

It is not uncommon in Montana for a peace officer in one jurisdiction to call for assistance from an agency in another. City police, county sheriffs, highway patrolmen, fish and game wardens—all render assistance to each other in emergency situations—but often at their own risk.

This legislation attempts to set the responsibilities, liabilities and obligations of government when an officer responds to a call for assistance.

The problems addressed here are complex ones involving laws of master servant, agency, tort and insurance, not to mention the abolishment of sovereign immunity in Montana.

After an officer has responded to a call for assistance outside his employer's jurisdiction, two questions immediately arise:

1) Who is responsible for him if he is injured?
2) Who is liable if he injures someone else?

Other states have similar legislation from which this bill was drawn.

BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO ENABLE PEACE OFFICERS TO RETAIN ALL THE PRIVILEGES AND IMMUNITIES FROM LIABILITY, ALL PENSION, INSURANCE, SALARY AND OTHER BENEFITS TO WHICH THEY ARE NORMALLY ENTITLED, WHEN RESPONDING TO, AND/OR PROVIDING ASSISTANCE TO, ANY OTHER PEACE OFFICER WHO HAS CALLED FOR ASSISTANCE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA: (1)

Section 1. Any peace officer or any law enforcement entity of any county, city or town or any state government law enforcement entity may request the assistance of peace officers from other law enforcement entities within the state of Montana. Any peace officers while on such request for assistance shall be deemed employees of the (2) requesting law enforcement entity and shall have the same powers, duties, rights, privileges and immunities as peace officers of the requesting entity.

Section 2. All peace officers rendering assistance persuant to this section shall be entitled to the same wage, salary, pension, worker's compensation and all other service rights for such service as for service rendered within the law enforcement entity in which they are normally employed.

Section 3. The law enforcement entity rendering assistance shall pay all wage, pension and disability payments, worker's compensation claims, claims for damage to clothing and equipment, and medical expense incurred by its personnel in rendering assistance. Upon making such payment such law enforcement entity shall be reimbursed by the law enforcement entity that requested the services out of which the payments arose. (3)

Section 4. Law enforcement entities requesting assistance under this section shall also be liable for any liability or obligation to indemnify the assisting peace officer, their legal representatives in case of death, or the furnishing law enforcement entity for any liability or obligation to indemnify created by Section 82-4322-1 and 82-4323 which may occur as a result of any assistance furnished. (4)

- End -

RESEARCH NOTATION

PEACE OFFICER ASSISTANCE

Other states which have similar legislation are Wisconsin (59.24, 66.305, 66.315); Arizona (13-1362); Colorado (29-5-107); Florida (23-12) and Illinois (24 Sec. 1-4-6, 1-4-8).

Kish v. Montana State Prison, 161 Montana 297, 505 P2d 891. Case mentions "loaned servant" doctrine and may be applicable to peace officers.

Salaries and benefits vary from jurisdiction to jurisdiction. Section 3 attempts to resolve these differences.

See **Antanopoulus v. Town of Telluride,** 532 P2d 346 (Colo.) and Article II, Sec. 18, 1973, Montana Constitution, abolishing sovereign immunity.

Other statutes which may apply:

82-4322.1, R. C. M., 1947

82-4323, R. C. M., 1947

83-706.1, R. C. M., 1947

87-701, R. C. M., 1947

MONTANA ASSOCIATION
OF
CHIEFS OF POLICE

September 14, 1976

Senator Michael Greely
c/o Montana Justice Project
1336 Helena Avenue
Helena, Montana 59601

Dear Senator Greely:

On September 10 and 11, 1976, the Montana Chiefs of Police Association met at West Yellowstone; and would like to make it known to the Montana Justice Project that this association, as a whole, would like to go on record in full support of the legislation on the following items:

1. The Mandated Basic Training for Peace Officers.

2. The Peace Officers' Assistance.

3. The creation of a full time Board of Pardons.

4. Legislation to constitutionalize the death penalty in Montana.

5. Standard 1.3 for Full State Funding of the Montana Law Enforcement Academy Bureau.

6. The legislation for the creation of a State Forensic Science Lab.

Sincerely,

G. Paul Smith

G. Paul Smith
Secretary-Treasurer
Montana Chiefs of Police Association

GPS:gs

Douglas B. Kelley
Attorney At Law
Jordan, Montana 59337

Private Practice
(406) 435-2480

County Attorney
(Garfield County)

March 10, 1976

Mr. John Scully
Deputy County Attorney
Gallatin County Courthouse
Bozeman, Montana 59715

Re: Forensic Lab Legislation

Dear John:

In the meeting of the Montana County Attorneys Association held in Bozeman, Montana, on February 21, 1976, the association adopted a resolution supporting the creation of a Forensic Lab as proposed by the Governor's Police Task Force. As secretary of the association I have been requested to convey to you and the other members of the Police Task Force our unswerving and wholehearted support for the creation of such a lab. Please convey to the other members of the Police Task Force the position of the Montana County Attorneys Association.

If either you or other members of the Police Task Force have any additional questions, please feel free to contact either myself or Ron Smith, President of the Montana County Attorneys Association.

Sincerely yours,

Douglas B. Kelley, Secretary
Montana County Attorneys Association

DBK:ldm

Montana Association of Criminal Justice Educators

Carroll College
College of Great Falls
Dawson College
Eastern Montana College
Flathead Valley Community College
Montana Law Enforcement Academy
Montana State University
University of Montana

April 28, 1976

Senator Mike Greely, Chairman
Montana Council on Criminal Justice
Standards and Goals
1336 Helena Avenue
Helena, Montana 59601

Dear Senator Greely:

The Montana Association of Criminal Justice Educators strongly endorses the recommendations and standards on Criminal Justice education passed by the Task Force on Police and the Task Force on Corrections. We urge the Council to adopt these standards and recommendations and to give them high priority in their report to the Governor.

In particular we urge the Council to support Recommendations 5-A through E of the Police Task Force report and Standards 14.9 and 14.10 of the Corrections Task Force report.

In general we support any efforts to provide increased education and training for persons working at all levels of criminal justice. We also support upgrading the educational and training programs provided by correctional agencies.

We support the goal of the Council to improve Montana's criminal justice system. We are convinced that increased education and training for criminal justice personnel and expanded programs of education and vocational training for adult and juvenile offenders would be a significant step in reaching that goal.

Sincerely,

Richard Vandiver

Richard Vandiver
Chairman, MACJE

MONTANA ASSOCIATION
OF
CHIEFS OF POLICE

February 9, 1976

Brent Markel
Director
Montana Justice Project
1336 Helena Ave.
Helena, Montana 59601

Dear Mr. Markel

The Montana Chiefs of Police Association would like to take this means to voice total support for the Montana Justice Project's standards and proposed legislation regarding the Forensic Science System.

The establishment of an office of pathology and laboratory of criminalistics is long overdue in the state of Montana. Montana's chiefs have always recognized the need to improve our state's criminal justice system, and see the development of a Forensic Science System as a basic, and most urgently needed step in the right direction.

We will provide whatever assistance we can to aid in the development of this proposal.

Sincerely,

Ken Losett

Ken Losett, President
Montana Association of
Chiefs of Police

KL/cs

CHAPTER III

COURTS

COURTS

COURTS TASK FORCE REPORT

CHAPTER TITLES:

- Screening
- Diversion
- Plea Negotiation
- The Litigated Case
- Sentencing
- Review of Trial Court Proceedings
- The Judiciary
- The Lower Courts
- Court Administration
- Court/Community Relations
- The Prosecution
- The Defense
- Juveniles
- Side Issues

See Appendix A for abbreviated descripiton of standards and recommendations contained in all of the task force reports.

Sixty-one standards and recommendations proposed by the Courts Task Force were adopted by the Montana Council on Criminal Justice Standards and Goals.

The report itself is difficult to assimilate because of its comprehensiveness, and because chapters and standards are interrelated and dependent upon one another.

Many standards will require further study and evaluation by judicial system personnel and the legislature prior to implementation. We urge those involved to press forward with the required research.

In its effort to select priorities, the task force identified the following areas of most concern:

- Concern for the victims of crime
- Plea negotiation procedures
- Unification of the state court system
- Professionalization of adjudication process
- Speeding up the judicial process

Each of these areas encompass numerous standards which must be read together. For instance, "professionalization of the adjudication process" calls upon standards for defense as well as prosecution; education of judges; unification of the court system.

From this process, the Montana Justice Project selected specific areas which require legislative action:

- plea negotiation
- court administration
- judicial education

The task force and the council expressed deep concern for the victims of crime, and discussed legislative alter-

natives for the compensation of victims of crime. No legislation in this area is proposed due to ongoing studies being conducted by the Board of Crime Control. When this data is available, a deeper view of the problem and its solution will be available to law makers.

A substantial number of adopted standards may be implemented by court rule or by amendment of established court procedures.

PLEA NEGOTIATIONS

ADOPTED STANDARDS

STANDARD 3.1

CONSIDERATIONS WHICH ARE APPROPRIATE IN DETERMINING IF PLEA NEGOTIATION IS JUSTIFIED INCLUDE:

1. THAT THE DEFENDANT BY HIS PLEA HAS AIDED IN ENSURING THE PROMPT AND CERTAIN APPLICATION OF CORRECTIONAL MEASURES TO HIM.

2. THAT THE DEFENDANT HAS ACKNOWLEDGED HIS GUILT AND SHOWN A WILLINGNESS TO ASSUME RESPONSIBILITY FOR HIS CONDUCT.

3. THAT THE CONCESSIONS WILL MAKE POSSIBLE ALTERNATIVE CORRECTIONAL MEASURES WHICH ARE BETTER ADAPTED TO ACHIEVING REHABILITATIVE, PROTECTIVE, DETERRENT OR OTHER PURPOSES OF CORRECTIONAL TREATMENT, OR WILL PREVENT UNDUE HARM TO THE DEFENDANT FROM THE FORM OF CONVICTION.

4. THAT THE DEFENDANT HAS MADE PUBLIC TRIAL UNNECESSARY WHEN THERE ARE GOOD REASONS FOR NOT HAVING THE CASE DEALT WITH IN A PUBLIC TRIAL.

5. THAT THE DEFENDANT HAS GIVEN OR OFFERED COOPERATION WHEN SUCH COOPERATION HAS RESULTED OR MAY RESULT IN THE SUCCESSFUL PROSECUTION OF OTHER OFFENDERS ENGAGED IN EQUALLY SERIOUS OR MORE SERIOUS CRIMINAL CONDUCT.

EACH JURISDICTION SHOULD SET A TIME LIMIT AFTER WHICH PLEA NEGOTIATIONS

There exists no concensus about plea bargaining. One national advisory commission recommended that it be abolished, while another (the American Bar Association) supported the practice and established procedures to be followed.

The task force and the Council concluded that plea bargaining is "a fact of life" within our adversary system of justice, and that it is far better to have the process out in the open with formal rules and safeguards than to have it under the table with all that implies.

It is emphasized that plea bargaining is justified only on infrequent occasions. It is a practice which, through misuse and misunderstanding, has done our judicial system inestimable harm in loss of public confidence and respect.

The main thrust of the proposed legislation is to bring a negotiated plea between prosecutor, defense and defendant into the open, spread it upon the record of the court, yet maintain the integrity and independance of the trial judge to reach a decision on that agreement.

Please see Appendix F.

MAY NO LONGER BE CONDUCTED.

THE SOLE PURPOSE OF THIS LIMITATION SHOULD BE TO INSURE THE MAINTENANCE OF A TRIAL DOCKET THAT LISTS ONLY CASES THAT WILL GO TO TRIAL. AFTER THE SPECIFIED TIME HAS ELAPSED, ONLY PLEAS TO THE OFFICIAL CHARGE SHOULD BE ALLOWED, EXCEPT IN UNUSUAL CIRCUMSTANCES AND WITH THE APPROVAL OF THE JUDGE AND THE PROSECUTOR.

STANDARD 3.2

THE PROSECUTING ATTORNEY, IN REACHING A PLEA AGREEMENT, MAY AGREE TO ONE OR MORE OF THE FOLLOWING, AS DICTATED BY THE CIRCUMSTANCES OF THE INDIVIDUAL CASE:

1. TO MAKE, OR NOT TO OPPOSE, FAVORABLE RECOMMENDATIONS AS TO THE SENTENCE WHICH SHOULD BE IMPOSED IF THE DEFENDANT ENTERS A PLEA OF GUILTY:

2. TO SEEK, OR NOT TO OPPOSE, DISMISSAL OF THE OFFENSE CHARGED IF THE DEFENDANT ENTERS A PLEA OF GUILTY TO ANOTHER OFFENSE REASONABLY RELATED TO DEFENDANTS CONDUCT: OR,

3. TO SEEK, OR NOT TO OPPOSE, DISMISSAL OF OTHER CHARGES OR POTENTIAL CHARGES AGAINST THE DEFENDANT IF THE DEFENDANT ENTERS A PLEA OF GUILTY.

BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO AUTHORIZE AND ESTABLISH A PROCEDURE FOR PLEA NEGOTIATIONS AND AGREEMENTS" (1)

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA: (2)

Section 1. Plea negotiations. The attorney for the state of Montana and the attorney for the defendant may engage in negotiations for the purpose of reaching an agreement that, upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the attorney for the state will do any of the following:

(a) move for dismissal of other charges; or

(b) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding on the court; or

(c) agree that a specific sentence is the appropriate disposition of the case.

No court shall participate in any plea negotiation.

Section 2. Notice of plea agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to

the acceptance or rejection thereof until there has been an opportunity to consider the presentence report.

Section 3. Acceptance of a plea agreement. The court may accept a plea agreement of the parties when the interest of the public in insuring that justice be done would thereby be served. Among the considerations which are appropriate in determining whether such acceptance is justified are:

(a) That the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him.

(b) That the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct.

(c) That the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction.

(d) That the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial.

(e) That the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious conduct.

If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgement

and sentence the disposition provided for in the plea agreement, subject to consideration of the presentence report.

Section 4. Factual basis for the plea. Notwithstanding the acceptance of a plea of guilty pursuant to a plea agreement, the court shall not enter judgement upon such a plea without making sufficient inquiry as shall disclose that there is a factual basis for the plea.

Section 5. Rejection of a plea agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to withdraw his guilty plea, and advise the defendant that if he persists in his guilty plea the disposition of the case may be less favorable to him than that contemplated by the plea agreement.

Section 6. Time limit for plea negotiations. Each court in the state of Montana may establish, by order or rule, a time limit after which plea negotiations may no longer be conducted in order to insure a trial docket that lists only cases that will go to trial. In the absence of such an established time limit, except for good cause shown, all plea negotiations shall have been concluded by, and notification to the court of the existance of a plea agreement shall be given at, the time of arraignment or at such other time,

not later than ten (10) days prior to trial, as may be fixed by the court.

Section 7. Inadmissibility of pleas, offers of pleas, and related statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissable in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or an offer to plead guilty, is admissable in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel. (3)

- End -

RESEARCH NOTATIONS
PLEA NEGOTIATIONS

(1) Plea bargaining is a constitutional process.

Brady v. U.S., 397 U.S. 742, 90 Supreme Court 1463 (1970)

Santobello v. New York, 404 U.S. 257, 92 Supreme Court, 495 (1971)

People v. West, 3 Cal. 3rd. 595, 477 P 2d 409

State v. Nance, 120 Montana 152

State v. Sattler, 33 St. Rep. 475 (1976)

State v. Morgan, 131 Mont. 58

State v. Griffin, 535 P 2d 498

(2) Primary source for the proposed legislation is Rule 11 of Federal Rules of Criminal Procedure, and the Minnesota Rules of Criminal Procedure, Rule 15.04 (3) (2).

(3) The proposed bill may be placed in Title 95, Chapter 19, R. C. M., 1947 either as an addition to 95-1902, or as a new section — 95-1902.1.

Additional notations concerning plea bargaining is contained in Appendix F of this report.

STATE COURT ADMINISTRATOR

ADOPTED STANDARDS

STANDARD 9.1

AN OFFICE OF STATE COURT ADMINISTRATOR SHALL BE ESTABLISHED. THE STATE COURT ADMINISTRATOR SHALL BE SELECTED BY THE MONTANA SUPREME COURT, AND HE SHALL BE SUBJECT TO REMOVAL BY THE SAME AUTHORITY. THE STATE COURT ADMINISTRATOR SHALL, SUBJECT TO THE MONTANA SUPREME COURT, ESTABLISH POLICIES FOR THE ADMINISTRATION OF THE STATES' COURTS. HE ALSO SHALL ESTABLISH AND IMPLEMENT GUIDELINES FOR THE EXECUTION OF THESE POLICIES, AND FOR MONITORING AND REPORTING THEIR EXECUTION. SPECIFICALLY THE STATE COURT ADMINISTRATOR SHALL:

1. PREPARE A BUDGET FOR THE OPERATION OF THE ENTIRE COURT SYSTEM OF THE STATE AND SUBMIT IT TO THE APPROPRIATE LEGISLATIVE BODY.

2. ESTABLISH UNIFORM PERSONNEL POLICIES AND PROCEDURES GOVERNING RECRUITMENT, HIRING, REMOVAL, COMPENSATION, AND TRAINING OF ALL NONJUDICIAL EMPLOYEES OF THE COURTS.

3. DEVELOP A STATE WIDE INFORMATION SYSTEM. THIS SYSTEM SHALL INCLUDE BOTH STATISTICS AND NARRATIVE REGARDING THE OPERATION OF THE ENTIRE STATE COURT SYSTEM. AT LEAST YEARLY, THE STATE COURT ADMINISTRATOR SHALL ISSUE AN OFFICIAL REPORT TO THE PUB-

As of 1975, 46 states and the District of Columbia had court administrators.

The Montana Supreme Court has taken a step in this direction with the support of funds from the Montana Board of Crime Control.

The concept of a court administrator for Montana has met with some skepticism at all levels of our 3-step court system.

For the job to be done right, a full-time person trained for the task is necessary. The scope of his activities should be detailed by statute.

There exists a wealth of material, research, case law and law review articles, not to mention existing statutes in other states describing the position of court administrator. Research in support of the proposed bill is available at the Montana Board of Crime Control, Helena.

Standard 7.4 concerning judicial education is incorporated in this proposed bill in Section 3, subparagraph 6.

This portion of the proposed bill would require the court administrator to establish a comprehensive, ongoing education program for the judiciary, and also provides for disciplinary procedures should any judge refuse to participate in the program.

NOTE

After drafting the following legislation based upon adopted standards, the council was informed that a subcommittee of the Legislative Council had also written a bill concerning a state court administrator. The Council compared both bills, and both are included herein.

LIC AND THE LEGISLATURE, CONTAINING INFORMATION REGARDING THE OPERATION OF THE COURTS.

4. BE RESPONSIBLE FOR POLICIES AND GUIDELINES RELATING TO ACCOUNTING AND AUDITING, AS WELL AS PROCUREMENT AND DISBURSEMENT FOR THE ENTIRE STATE WIDE COURT SYSTEM.

5. MAINTAIN LIAISON WITH GOVERNMENT AND PRIVATE ORGANIZATIONS, LABOR AND MANAGEMENT, AND HANDLE PUBLIC RELATIONS.

6. CONTINUALLY EVALUATE THE EFFECTIVENESS OF THE COURT SYSTEM AND RECOMMEND NEEDED CHANGES.

7. UNDER THE DIRECTION OF THE SUPREME COURT, ASSIGN JUDGES ON A STATEWIDE BASIS WHEN REQUIRED.

STANDARD 9.3

EACH TRIAL COURT WITH FIVE OR MORE JUDGES (AND WHERE JUSTIFIED BY CASELOAD, COURTS WITH FEWER JUDGES) SHALL HAVE A FULL-TIME LOCAL TRIAL COURT ADMINISTRATOR. TRIAL COURTS WITH CASELOADS TOO SMALL TO JUSTIFY A FULL-TIME ADMINISTRATOR SHALL COMBINE INTO ADMINISTRATIVE REGIONS AND HAVE A REGIONAL ADMINISTRATOR. LOCAL AND REGIONAL TRIAL COURT ADMINISTRATORS SHALL BE APPOINTED BY THE STATE COURT ADMINISTRATOR WITH THE APPROVAL OF THE ADMINISTRATIVE JUDGE OF THE REGION OR DISTRICT, SUBJECT TO CONFIRMATION BY THE STATE SUPREME COURT. THE FUNCTIONS OF LOCAL AND REGIONAL COURT ADMINISTRATORS SHALL INCLUDE THE FOLLOWING:

The chief difference between them concerns the responsibility of the administrator to establish a judicial training program.

The Montana Justice Project strongly recommends that should the Legislative Council bill be adopted by the legislature, that provisions concerning judicial education be added to that bill.

Both bills are essentially compatible but for the judicial education section, (Section 3 (6) of the Montana Justice Project proposal), and the fact that the Justice Project proposal is more definitive of duties and responsibilities.

1. IMPLEMENTATION OF POLICIES SET BY THE STATE COURT ADMINISTRATOR;

2. ASSISTANCE TO THE STATE COURT ADMINISTRATOR IN SETTING STATEWIDE POLICIES.

3. PREPARATION AND SUBMISSION OF THE BUDGET FOR THE COURT OR COURTS WITH WHICH HE IS CONCERNED.

4. RECRUITING, HIRING, TRAINING, EVALUATING, AND MONITORING PERSONNEL;

5. MANAGEMENT OF SPACE, EQUIPMENT AND FACILITIES;

6. DISSEMINATION OF INFORMATION;

7. PROCUREMENT OF SUPPLIES AND SERVICES;

8. CUSTODY AND DISBURSEMENT OF FUNDS;

9. PREPARATION OF REPORTS;

10. JUROR MANAGEMENT;

11. STUDY AND IMPROVEMENT OF CASEFLOW, TIME STANDARDS AND CALENDARING; AND

12. RESEARCH AND DEVELOPMENT OF EFFECTIVE METHODS OF COURT FUNCTIONING, ESPECIALLY THE MECHANIZATION AND COMPUTERIZATION OF COURT OPERATIONS, THE LOCAL AND REGIONAL COURT ADMINISTRATORS SHALL DISCHARGE THEIR FUNCTIONS WITHIN THE GUIDELINES SET BY THE STATE COURT ADMINISTRATOR.

MONTANA JUSTICE PROJECT PROPOSAL

BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH THE OFFICE OF STATE COURT ADMINISTRATOR."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. State court administrator--office created--appointment--term--compensation. There is established the office of state court administrator. The court administrator shall be appointed by the supreme court and shall hold his position at the pleasure of the court. The salary of the court administrator shall be fixed by the supreme court, but shall not exceed that fixed by the state for any district judge.

Section 2. Assistants and employees of state court administrator. The court administrator may employ such other personnel as the supreme court deems necessary at salaries fixed by the supreme court. Neither the court administrator nor any assistant may practice law in any of the courts of this state while holding his position.--(The court administrator and his assistants shall devote full time to their respective official duties to the exclusion of any profession for profit.)--

Section 3. Duties and powers of the state court administrator. The state court administrator is the administrative

officer of the court. Under the direction of the supreme court, the court administrator shall:

(1) design, implement, and maintain a statewide information system. This system shall consist of both statistical and narrative information regarding the operation of the entire state court system, including but not limited to:

(a) the business transacted by the various courts of Montana,

(b) the state of their dockets,

(c) the needs, if any, for assistance to expedite the handling of judicial business pending in the courts,

(d) and such other matters as bear on the work and the administration of the state court system.

At least yearly the court administrator shall issue an official report to the public and the legislature, containing information regarding the operation of the state court system. He shall make periodic reports and recommendations to the supreme court.

(2) indicate which courts are in need of additional judicial personnel and make recommendations to the supreme court concerning the assignment or reassignment of personnel to courts that are in need of such personnel. The administrator shall also carry out the directives of the supreme court as to the assignment or reassignment of duly elected district judges to perform judicial functions and duties outside of their local jurisdiction when it is deemed necessary for the efficient operation of the state

court system and to insure the prompt and proper administration of justice.

(3) prepare annually a consolidated budget for the maintenance and operation of the state court system. This budget shall be submitted to the _____by the court administrator.

(4) prescribe the procedures to be used by the constituent courts of the state court system with respect to:

(a) the preparation of budget requests,

(b) the disbursement of funds appropriated to the courts of the state court system,

(c) the purchase of forms, supplies, equipment, and other items as authorized in the state court system operating budget, and

(d) any other matter relating to fiscal administration.

(5) develop personnel standards, policies and procedures and make recommendations concerning all matters of personnel, including but not limited to:

(a) recruitment,

(b) hiring,

(c) removal,

(d) compensation and

(e) preservice and inservice educational and training programs for all nonjudicial employees of the courts.

(6) develop education programs for the judges of the constituent courts of the state court system. These programs shall be for the purpose of orienting judges to new assignments and keeping them informed concerning new

developments in the law. The programs shall include, without being limited to, sentencing alternatives and information concerning correctional programs and institutions.

(7) perform such other duties and attend to such other matters consistent with the powers delegated herein and assigned to him by the supreme court.

Section 4. Cooperation of court officers. All court officers, including clerks of district courts, shall comply with requests made by the court administrator for information and statistical data relative and the transacted by the courts.

Section 5. TENTATIVE Other personnel for state court administration -- youth court administrator. Subject to section 2 of the act, the court administrator may appoint a youth court administrator. Under the direction of the state court administrator, the youth court administrator shall:

(1) develop programs for inservice education and training of youth court personnel, including, without being limited to, judges and probation officers,

(2) gather and disseminate information about services and administration of the Montana juvenile justice system, resources available to the Montana juvenile justice system, and significant developments in juvenile law,

(3) establish and enforce qualifications for appointive youth court personnel,

(4) be responsible for the fiscal management for youth court programs and activities,

(5) standardize youth court procedures in conformity with the provisions of the youth court act,

(6) enter into cooperative agreements when necessary with state and local agencies and organizations concerned with youth activities and services, and generally maintain coordination and close liaison among district youth court systems and state and local agencies and organizations concerned with youth programs and services, and

(7) perform such other duties as the state court administrator may assign.

Section 6. TENTATIVE Other personnel for state court administration -- regional trial court administration. Subject to section 2 of this act, the state court administrator may appoint regional trial court administrators. The appointment shall further be approved by the district judges of the districts comprising a region. One regional trial court administrator may be assigned for any combination of judicial districts having a total of _____ (or more) district judges.

Under the direction of the state court administrator, the regional trial court administrator shall:

(1) implement policies set by the state court administrator

(2) prepare and submit to the state court administrator budgets for the courts with which he is concerned

(3) recruit, hire, train, evaluate and monitor personnel

(4) study and implement procedures to improve caseflow, time standards, and calendering

(5) research and develop effective methods of court functioning, especially the mechanization and computerization of court operations, and

(6) perform such other duties as the state court administrator may assign.

Section 7. Severability, Of a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

- End -

(LEGISLATIVE COUNCIL PROPOSAL)

COURT ADMINISTRATOR

BILL NO. 2

A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH THE OFFICE OF COURT ADMINISTRATOR."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Court administrator--office created--appointment--terms--compensation. There is established the office of court administrator. The supreme court shall appoint a court administrator, and shall fix the salaries of the court administrator and his assistants. The court administrator shall hold his position at the pleasure of the court.

Section 2. With the approval of the supreme court, the court administrator may hire assistants to assist him in the performance of his duties. Neither the court administrator nor any assistant may practice law in any of the courts of this state while holding his position.

Section 3. Duties. The court administrator is the administrative officer of the court. Under the direction of the supreme court, the court administrator shall:

(1) prepare and present judicial budget requests to the legislature;

(2) collect, compile, and report statistical and other data relating to the business transacted by the courts, and provide such information to the legislature upon request;

(3) recommend to the supreme court improvements in the judiciary; and

(4) perform such other duties as the supreme court may assign.

Section 4. Cooperation of court officers. All court officers, including clerks of district courts, shall comply with requests made by the court administrator for information and statistical and financial data bearing on the business transacted by the courts.

Section 5. Federal funds. The supreme court may accept federal funds to supplement the funds appropriated to the court for the purpose of carrying out this act.

Section 6. Severability. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

INVESTIGATIVE SUBPOENA FOR COUNTY ATTORNEY AND ATTORNEY GENERAL

STANDARD 11.6

THE PROSECUTOR'S PRIMARY FUNCTION SHALL BE TO REPRESENT THE STATE IN COURT. HE SHALL COOPERATE WITH THE POLICE IN THEIR INVESTIGATION OF CRIME. EACH PROSECUTOR ALSO SHALL HAVE INVESTIGATORIAL RESOURCES AT HIS DISPOSAL TO ASSIST HIM IN CASE PREPARATION, TO SUPPLEMENT THE RESULTS OF POLICE INVESTIGATION WHEN POLICE LACK ADEQUATE RESOURCES FOR SUCH INVESTIGATION AND, IN A LIMITED NUMBER OF SITUATIONS, TO UNDERTAKE AN INITIAL INVESTIGATION OF POSSIBLE VIOLATIONS OF THE LAW.

THE PROSECUTOR SHALL BE GIVEN THE POWER, SUBJECT TO APPROPRIATE SAFEGUARDS, TO ISSUE SUBPOENAS REQUIRING POTENTIAL WITNESSES IN CRIMINAL CASES TO APPEAR FOR QUESTIONING. SUCH WITNESSES SHALL BE SUBJECT TO CONTEMPT PENALTIES FOR UNJUSTIFIED FAILURE TO APPEAR FOR QUESTIONING OR TO RESPOND TO SPECIFIC QUESTIONS.

THE OFFICE OF THE PROSECUTOR SHALL REVIEW ALL APPLICATIONS FOR SEARCH AND ARREST WARRANTS PRIOR TO THEIR SUBMISSION BY LAW ENFORCEMENT OFFICERS TO A JUDGE FOR APPROVAL; NO APPLICATION FOR A SEARCH OR ARREST WARRANT SHALL BE SUBMITTED TO A JUDGE UNLESS THE PROSECUTOR OR ASSISTANT PROSECUTOR APPROVES THE WARRANT.

A bill (S.B. 80) similar in some aspects to the bill herein contained was introduced in the last legislature. It failed.

Many of the objectionable parts of S.B. 80 have been removed from this proposed bill.

In addition, the Montana Justice Project Council added changes which it felt strengthened the safeguards required in any act of this kind.

Considerable discussion involved "transaction immunity" and "use immunity" concepts. The council opted to specifically refer to Montana's existing immunity statute (R.C.M., 95-1807, 1947) which uses the word "transaction."

In addition, the council added language to the proposed bill which would permit counsel to be with a witness at all steps of the proceedings. It also limited the power to issue such a subpoena to justices of the supreme court and district court judges.

BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR AN INVESTIGATIVE SUBPOENA FOR COUNTY ATTORNEYS AND THE ATTORNEY GENERAL, PROVIDING PROCEDURES THEREFORE, AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Investigative subpoena -- issuance.

(1) In all cases where the attorney general or the county attorney has a duty to investigate criminal activity, any Justice of the Supreme Court or District Court judge of this state may cause subpoenas to be issued commanding each person to whom directed to appear before the attorney general or the county attorney and give testimony and produce such books, records, papers, documents, and other objects as may be necessary and proper to the investigation. A subpoena shall issue only when it appears upon the affidavit of the attorney general or the county attorney that the administration of justice requires the subpoena to be issued.

(2) Failure by any person without just cause and following a hearing to obey a subpoena served upon them pursuant to this act is a contempt of the court from which the subpoena issued.

(3) A person aggrieved by a subpoena issued pursuant to this act may, within a reasonable time, file a motion to dismiss the subpoena, and in the case of a subpoena duces tecum, to limit its scope. The motion shall be granted if the subpoena

was improperly issued, or in the case of a subpoena duces tecum, if it is overbroad in its scope.

(4) Persons subpoenaed pursuant to this act shall have the same right to counsel as do defendants in criminal actions including the right to have counsel present at all times.

Section 2. Conduct of investigative inquiry.

(1) The attorney general or the county attorney may examine under oath all witnesses subpoenaed pursuant to this act and testimony may be recorded and transcribed in the manner provided for grand jury proceedings.

(2) All proceedings conducted pursuant to this act shall be closed to the public and the secrecy and disclosure provisions relating to grand jury proceedings shall apply. Any person who divulges the contents of the application or the proceedings without legal privilege to do so is punishable for contempt.

(3) All penalties for perjury or preparing, submitting or offering false evidence shall apply to proceedings conducted under this act.

Section 3. Self-incrimination and immunity.

(1) No person subpoenaed to give testimony pursuant to this act may be required to make any statement or produce any evidence which may incriminate him. The immunity provisions of Section 95-1807 R.C.M., 1947 shall apply to proceedings under this act.

(2) Nothing in this act shall be construed to require a witness to divulge the contents of a legally privileged communication unless the privilege is waived as provided by law.

Section 4. Service, witness fees and costs.

(1) The method of service of subpoenas issued pursuant to this act, witness fees, and mileage shall be the same as required in other criminal actions in this state. The state shall bear all costs when application for subpoenas is made by the attorney general and each county shall bear all costs when application for subpoenas is made by its county attorney.

(2) All provisions relating to court subpoenas in criminal cases shall apply to subpoenas issued pursuant to this act, including the provisions of the Uniform Act to Secure the Attendance of Witnesses from without the state in criminal cases.

Section 5. Effective date. This act is effective on its passage and approval.

CHAPTER IV

CORRECTIONS

CORRECTIONS

CORRECTIONS TASK FORCE REPORT CHAPTER TITLES:

- Legislation
- Rights of Offenders
- Diversion
- Pretrial Release and Detention
- Sentencing
- Classification of Offenders
- Community Corrections
- Jails and Community Correctional Centers
- Probation
- Major Institutions
- Parole
- Organization and Administration
- Manpower
- Research and Development

See Appendix A for abbreviated description of standards and recommendations contained in all of the task force reports.

Ninety-eight standards and recommendations proposed by the Corrections Task Force were adopted by the Montana Council on Criminal Justice Standards and Goals.

From this material, the Council selected the following five priority areas for immediate implementation:

- Unification of Corrections
- Diversion
- Sentencing the Non-dangerous Offender
- Expediting Criminal Trials
- Public Information

Considerable debate occurred in all five task forces over the diversion standards in Chapter Three. The concept of diversion was approved and the standards adopted by the Council, but no legislation is proposed at this time.

After amending certain task force standards, the Council chose to propose legislation covering the following:

- Full-Time Board of Pardons
- Sentencing the Non-Dangerous Offender

FULL-TIME BOARD OF PARDONS

COUNCIL STANDARD 11.1

THE QUALIFICATIONS AND CONDITIONS OF APPOINTMENT OF MEMBERS OF THE BOARD OF PARDONS SHOULD BE SPECIFIED BY STATUTE

1. THE PAROLE BOARD SHALL CONSIST OF THREE, FULL-TIME, PAID PROFESSIONAL MEMBERS, APPOINTED FOR 4 YEAR TERMS, WHO HAVE EXPERIENCE IN THE AREAS OF PENOLOGY, CRIMINOLOGY AND CORRECTIONS.

2. APPOINTED MEMBERS SHOULD HAVE A HIGH DEGREE OF SKILL IN COMPREHENDING LEGAL ISSUES AND STATISTICAL INFORMATION, AS WELL AS AN ABILITY TO DEVELOP AND PROMULGATE POLICY.

3. NEWLY APPOINTED MEMBERS SHOULD BE GIVEN A THOROUGH ORIENTATION TO THE BOARD'S FUNCTIONS, POLICIES, PROCESSES AND ACTIVITIES. AN ORIENTATION PLAN SHOULD BE ADOPTED BY THE BOARD.

4. BOARD MEMBERS SHOULD BE REQUIRED TO PARTICIPATE IN CONTINUING TRAINING ON A NATIONAL SCALE. EXCHANGE OF PAROLE BOARD MEMBERS AND STAFF MEMBERS WITH OTHER STATES FOR TRAINING PURPOSES SHOULD BE CONSIDERED ESSENTIAL

The need in Montana for a full-time professional board of pardons is recognized by the Montana Council on Criminal Justice Standards and Goals.

As our crime rates continue to climb, an increasing number of convicted felons are being sent to the state prison each year. (Increased prison population seems to be a national phenomenon.)

This increase in prison population causes a greater burden on the board of pardons to conduct timely parole and work release hearings.

Existing statutes concerning good-time, parole eligibility and rehabilitation further compound the nature and effectiveness of our parole procedures.

Law enforcement, courts and the public have a vital interest in parole procedures which, in effect, re-sentence a convicted felon to freedom — often in the same community he harmed.

The consequences of parole are so great both to the public and the prisoner that the function should be performed by full-time, professional personnel.

BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING SECTION 95-3204 R.C.M. 1947, TO ESTABLISH A FULL TIME BOARD OF PARDONS, AND ESTABLISHING REQUIREMENTS AND CONDITIONS FOR APPOINTMENT OF BOARD MEMBERS."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA: (1)

Section 1. There is a new subsection to section 95-3204 R.CM. 1947, that reads as follows:

The members of the board shall be appointed by the governor with the consent of the senate. Each member of the board shall devote his full time to the duties of the board. The terms of office of the existing members of the Board of Pardons shall expire upon the effective date of this act.

Section 2. There is a new subsection to section 95-3204 R.C.M. 1947, that reads as follows:

The members of the board shall serve for terms of four (4) years, or until their successors are duly appointed and qualified. New members shall have a thorough understanding of the boards functions, policies, processes and activities before participating as Board members. To insure that all new members meet the requirements provided for in this section, the board shall adopt an orientation plan to assist and enable new members to meet these requirements and conditions.

Section 3. There is a new subsection to section 95-3204 R.C.M. 1947, that reads as follows:

The board shall require its members to participate in continuing training on a local and national scale. Funding for the orientation and the subsequent training shall be provided by the department of institutions.

Section 4. There is a new subsection to section 95-3204 R.C.M. 1947, that reads as follows:

Members of the board shall receive an annual salary not less than $20,000. per year. Members of the board shall be reimbursed for actual expenses for transportation, lodging and subsistence while on the official business of the board. The governor shall designate one (1) member of the board to serve as chairman.

RESEARCH NOTATION

Bill drafters relied upon statutory language found in New Mexico and Colorado laws. See New Mexico, 41-17-37 through 41-17-41 (1975). Colorado, 17-1-201 (1974).

SENTENCING THE NON-DANGEROUS OFFENDER

STANDARD 5.1

1. THE MAXIMUM SENTENCE FOR ANY FIRST OFFENDER, NOT SPECIFICALLY FOUND TO REPRESENT A SUBSTANTIAL DANGER TO OTHERS, SHOULD NOT EXCEED FIVE YEARS FOR FELONIES OTHER THAN MURDER.

2. IN SENTENCING NON-DANGEROUS FIRST OFFENDERS, THE LEAST DRASTIC OF THE FOLLOWING SENTENCING ALTERNATIVES SHOULD BE UTILIZED BY THE COURTS CONSISTENT WITH PUBLIC SAFETY AND THE REHABILITATION OF THE OFFENDER:

a. UNCONDITIONAL RELEASE

b. CONDITIONAL RELEASE, INCLUDING RESTITUTION WHERE APPROPRIATE.*

c. A FINE

d. RELEASE UNDER SUPERVISION IN THE COMMUNITY

e. SENTENCE TO A HALFWAY HOUSE OR OTHER RESIDENTIAL FACILITY LOCATED IN THE COMMUNITY.

f. SENTENCE TO PARTIAL CONFINEMENT WITH LIBERTY TO WORK OR PARTICIPATE IN TRAINING OR EDUCATION.

g. TOTAL CONFINEMENT IN A CORRECTIONAL FACILITY.

h. FLAT TERM SENTENCING WITHOUT OPPORTUNITY FOR GOOD TIME OR PAROLE.

THE PROVISIONS OF SECTION 95-2206, R.C.M. 1947, AS AMENDED BY THE 1975 LEGISLATURE, ARE SPECIFICALLY APPROVED.

3. THE FOLLOWING FACTORS, IF PRESENT, SHOULD BE

The bill concerns a select group of offenders — i.e., those with no previous felony convictions. The bill then establishes a list of criteria or standards which a judge should use to determine if a particular, first-time offender is dangerous to others. If the judge determines the offender to be "nondangerous", the law would limit the maximum sentence to five years or less in the state prison.

At first glance, it would appear that the bill is unnecessary; that judges already exercise this kind of sentencing discretion, especially with first offenders. In large measure, that assumption is probably correct.

The Justice Project Council, however, felt that such determinations should be spelled out in writing by the judge, and that all judges should have standard criteria available to them against which to compare the facts of a particular case.

The council also noted that one very important aspect of such a procedure would be the enlightenment of the public about how and why a judge reached his sentencing decision.

Both the Courts Task Force and the Council expressed unanimous concern about the lack of public understanding of the judicial process.

WEIGHED BY THE COURTS WHEN CONSIDERING ALTERNATIVES TO INCARCERATION:

a. THE OFFENDER'S CRIMINAL CONDUCT NEITHER CAUSED, NOR ACTUALLY THREATENED, SERIOUS HARM.

b. THE OFFENDER DID NOT THINK OR INTEND THAT HIS CRIMINAL CONDUCT WOULD CAUSE OR THREATEN SERIOUS HARM.

c. THE OFFENDER ACTED UNDER STRONG PROVOCATION.

d. THERE WERE SUBSTANTIAL GROUNDS TENDING TO EXCUSE OR JUSTIFY THE OFFENDER'S CRIMINAL CONDUCT, THOUGH FAILING TO ESTABLISH DEFENSE.

e. THE OFFENDER HAD LED A LAW-ABIDING LIFE FOR A SUBSTANTIAL PERIOD OF TIME BEFORE COMMITTING THE CRIME.

f. THE OFFENDER IS LIKELY TO RESPOND TO PROBATION OR OTHER COMMUNITY SUPERVISION POSITIVELY.

g. THE VICTIM OF THE CRIME INDUCED OR FACILITATED ITS COMMISSION.

h. THE OFFENDER HAS MADE OR WILL MAKE RESTITUTION OR REPARATION TO THE VICTIM OF HIS CRIME FOR THE DAMAGE OR INJURY WHICH WAS SUSTAINED.

i. THE OFFENDER'S CONDUCT WAS THE RESULT OF CIRCUMSTANCES UNLIKELY TO RECUR.

j. THE CHARACTER, HISTORY, AND ATTITUDES OF THE OFFENDER INDICATE THAT HE IS UNLIKELY TO COMMIT ANOTHER CRIME.

k. IMPRISONMENT OF THE OFFENDER WOULD ENTAIL

UNDUE HARDSHIP TO DEPENDENTS.

l. THE OFFENDER IS ELDERLY OR IN POOR HEALTH.

m. THE CORRECTIONAL PROGRAMS WITHIN THE INSTITUTIONS TO WHICH THE OFFENDER WOULD BE SENT ARE INAPPROPRIATE TO HIS PARTICULAR NEEDS OR WOULD NOT LIKELY BE OF BENEFIT TO HIM.

*THE OFFENDER COULD BE MADE TO COMPENSATE THE VICTIM THROUGH A CIVIL ACTION IF THE VICTIM IS FOUND WITHOUT FAULT BY THE SENTENCING JUDGE OR JURY. THIS WOULD REQUIRE LEGISLATION.

BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR JUDICIAL DESIGNATION OF FIRST OFFENDERS, NOT SPECIFICALLY FOUND TO REPRESENT A SUBSTANTIAL DANGER TO OTHERS, AS NONDANGEROUS OFFENDERS; TO PROVIDE THAT THE MAXIMUM SENTENCE FOR A NON-DANGEROUS FIRST OFFENDER NOT EXCEED FIVE (5) YEARS; TO PROVIDE FOR AFFIRMATIVE JUSTIFICATION WHEN SENTENCE OF IMPRISONMENT IS IMPOSED; TO PROVIDE CRITERIA FOR FINDING THAT IMPRISONMENT IS APPROPRIATE SENTENCE; TO PROVIDE CRITERIA FOR WITHHOLDING SENTENCE OF IMPRISONMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Judicial designation of nondangerous offender -- maximum sentence -- finding of facts -- criteria for imposing sentence.

(1) A nondangerous offender is an offender who has not previously been convicted of a felony and who is specifically found not to represent a substantial danger to others. The court in designating the offender a nondangerous offender shall consider the nature and circumstance of the offense and the history and character of the offender, as set forth in subsection (5) of this act.

(2) The maximum sentence for any first offender designated a nondangerous offender shall not exceed five (5) years.

(3) In each case in which the court imposes a sentence of imprisonment upon a first offender designated a non-dangerous offender, the determination of the court shall be affirmatively supported by specific written findings of fact as to the existance or nonexistance of any of the factors set forth in subsection (4) and subsection (5) of this act.

(4) Aggravating factors that may (shall) justify imprisonment as an appropriate sentence shall include:

(a) There is undue risk that the offender will commit another crime if not confined; or

(b) The offender is in need of correctional treatment that can most effectively be provided by a sentence of imprisonment (and such services are reasonably available) ; or

(c) Any other alternative will depreciate the seriousness of the offense or undermine respect for law.

(5) Mitigating factors that shall be weighed in favor of withholding imprisonment as an appropriate sentence shall include:

(a) The offender's criminal conduct neither caused, nor actually threatened, serious harm; or

(b) The offender did not intend that his criminal conduct would cause or threaten serious harm; or

(c) The offender acted under strong provocation; or

(d) There were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the offender's conduct; or

(e) The offender has no history of prior criminal activity or has lead a law-abiding life for a substantial

period of time before committing the present offense; or

(f) The offender is likely to respond to probation or other community supervision positively; or

(g) The victim of the crime induced or facilitated its commission; or

(h) The offender has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained; or

(i) The offender's conduct was the result of circumstances unlikely to recur; or

(j) The character, history, and attitudes of the offender indicate that he is unlikely to commit another crime; or

(k) The imprisonment of the offender would entail undue hardship to his dependents; or

(l) The age or poor health of the offender; or

(m) The offender did not abuse a public position of responsibility or trust; or

(n) The offender has been confined for a considerable period of time prior to sentence; or

(o) The correctional programs within the institutions to which the offender would be sent are inappropriate to his particular needs or would not likely be of benefit to him.

- End -

The Big Sky Country

MONTANA STATE HOUSE OF REPRESENTATIVES

427 N. Tracy
Bozeman, Montana 59715

June 21, 1976

Paul Spengler, Coordinator
Corrections Task Force
Council on Criminal Justice Standards and Goals

Dear Mr. Spengler:

I have been reviewing the legislative recommendations proposed by the Corrections Task Force. I think the work is excellent, and I agree with most of the proposals. I am particularly interested in the recommendations concerning juvenile status offenders, alternatives to pretrial detention, installment fines, and jail release programs in which inmates work to pay back the victim.

I notice that some of the recommendations require appropriations. I hope the final report will indicate what range of financing is estimated.

I am very eager to work from the legislative end to see that these recommendations are adopted. Please keep me informed of your progress, and let me know what I can do to help.

Sincerely,

Dorothy Bradley

Dorothy Bradley

Montana Association of Criminal Justice Educators

Carroll College
College of Great Falls
Dawson College
Eastern Montana College
Flathead Valley Community College
Montana Law Enforcement Academy
Montana State University
University of Montana

April 28, 1976

Senator Mike Greely, Chairman
Montana Council on Criminal Justice
Standards and Goals
1336 Helena Avenue
Helena, Montana 59601

Dear Senator Greely:

The Montana Association of Criminal Justice Educators strongly endorses the recommendations and standards on Criminal Justice education passed by the Task Force on Police and the Task Force on Corrections. We urge the Council to adopt these standards and recommendations and to give them high priority in their report to the Governor.

In particular we urge the Council to support Recommendations 5-A through E of the Police Task Force report and Standards 14.9 and 14.10 of the Corrections Task Force report.

In general we support any efforts to provide increased education and training for persons working at all levels of criminal justice. We also support upgrading the educational and training programs provided by correctional agencies.

We support the goal of the Council to improve Montana's criminal justice system. We are convinced that increased education and training for criminal justice personnel and expanded programs of education and vocational training for adult and juvenile offenders would be a significant step in reaching that goal.

Sincerely,

Richard Vandiver

Richard Vandiver
Chairman, MACJE

CHAPTER V

INFORMATION SYSTEMS

INFORMATION SYSTEMS

INFORMATION SYSTEMS TASK FORCE REPORT CHAPTER TITLES:

- Information Systems Development
- Police Information Systems
- Courts Information Systems
- Corrections Information Systems
- The OBTS/CCH Concept
- Privacy and Security
- Technical System Development

See Appendix A for abbreviated description of standards and recommendations contained in all of the task force reports.

Fifty-eight standards and recommendations were proposed by the Information Systems Task Force and adopted by the Montana Council on Criminal Justice Standards and Goals.

A valiant effort was made to draft legislation which would incorporate concepts found mainly in Standard 1.1. Upon review of the draft, the council found it to be unacceptable. It was, in fact, too comprehensive and yet too loosely knit. It created a clumsy and unchecked bureaucratic structure not contemplated by the task force or the council.

The bill draft, therefore, is deleted from this report.

The council wishes to stress, however, that the task force and the standards in it are valid and represent guidelines which should be used in the future development of criminal justice information capabilities and systems. The report outlines problems which must be overcome. It explains in "lay language" the complexities surrounding both manual and computer based systems.

Four high priority areas were selected by the task force. These concern:

- privacy and security safeguards
- development, administration and operation planning
- identification of quality data for system users — law enforcement, courts, corrections — concerning criminal history and transactions within the criminal justice process
- mandatory reporting laws

Unanimous concern was expressed by the council about the lack of leadership and control over the development of statewide information systems. The short draft bill included here would, in effect, create state leadership, control and

cooperation by mandating the Montana Board of Crime Control to plan for and develop legislation to implement an information system for the state of Montana.

Privacy and security draft legislation very likely will be presented to the legislature during the 1977 session. The council strongly urges the legislature to compare any proposed bill to standards contained in the Information Systems Task Force Report, and to add material from that report to such a bill where appropriate.

Standards in the report concerning privacy and security are:

- Standards 5.7 through 5.12
- all of Chapter 6

In addition, a table in Appendix G compares a bill drafted by the Montana Board of Crime Control with the above standards.

BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF A MONTANA CRIMINAL JUSTICE INFORMATION SYSTEM; TO PROVIDE THAT THE MONTANA CRIME CONTROL BOARD ASSUME CENTRAL RESPONSIBILITY FOR THE DEVELOPMENT OF SUCH SYSTEM; TO PROVIDE FOR THE DRAFTING OF NECESSARY LEGISLATION TO IMPLEMENT STANDARDS SET FORTH BY THE INFORMATION SYSTEM TASK FORCE OF THE MONTANA JUSTICE PROJECT; TO PROVIDE THAT THE LEGISLATION SHALL BE PRESENTED TO THE 1979 LEGISLATIVE SESSION."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Establishment of criminal justice information system -- central responsibility to be in Montana Crime Control Board -- Board to draft and introduce legislation by 1979.

(1) There is hereby established for the State of Montana a system of communication of vital information relating to crimes, criminals, and criminal activity to be known as the Montana Criminal Justice Information System.

(2) Central responsibility for the development of the system shall be vested with the Montana Crime Control Board, within the Department of Justice.

(3) The Montana Crime Control Board shall draft, in accordance with the standards set forth by the Information System Task Force of the Montana Justice Project, any

legislation necessary to implement the system. The legislation deemed necessary by the Montana Crime Control Board shall be introduced to the 1979 legislative session.

- End -

CHAPTER VI

COMMUNITY CRIME PREVENTION

COMMUNITY CRIME PREVENTION

COMMUNITY CRIME PREVENTION TASK FORCE REPORT CHAPTER TITLES:

- Citizen Involvement
- Community Help Services
- Educational Systems and Programs
- Programs and Opportunities Providing Alternatives to Crime
- Restoring Public Trust and Confidence in Public Officials
- Drug and Alcohol Abuse
- Child Abuse and Neglect

Forty-four standards and recommendations proposed by the task force were adopted by the Montana Council on Criminal Justice Standards and Goals.

From these, the following five priorities were selected for immediate attention:

1) Emergency Community Services
2) Citizen Action Councils
3) Educational Systems — Programs
4) Code of Ethics
5) Alcohol and Drug Abuse

The Council selected and drafted proposed bills in the following areas:

- Financing Detoxification Centers
- Increased Community use of School Facilities

The Council did not draft a bill concerning a code of ethics for public employees, but it does note the constitutional requirement for one.

See Appendix A for abbreviated description of standards and recommendations contained in all of the task force reports.

FUNDING DETOXIFICATION CENTERS AND ALCOHOL TREATMENT PROGRAMS

STANDARD 2.2
NO LATER THAN 1980, EACH MONTANA COMMUNITY SHALL INDIVIDUALLY, OR IN CONTRACT WITH OTHERS, PROVIDE AN ADEQUATE EMERGENCY MEDICAL SERVICES SYSTEM AND ADEQUATE SERVICES AND FACILITIES FOR EMERGENCY YOUTH CARE, DETOXIFICATION FROM ALCOHOL OR DRUGS, TEMPORARY DETAINMENT OF PEOPLE WITH MENTAL HEALTH PROBLEMS, AND OTHER SITUATIONS ARISING WHICH DEMAND EMERGENCY CARE.

STANDARD 6.1
NO LATER THAN 1978, THE LEGISLATURE SHOULD MANDATE THAT AN ADEQUATE AMOUNT OF LIQUOR TAX REVENUE ALLOCATED TO THE STATE GENERAL FUND SHOULD BE DISTRIBUTED TO THE ADDICTIVE DISEASES DIVISION OF THE DEPARTMENT OF INSTITUTIONS FOR FINANCING THE ESTABLISHMENT OF DETOXIFICATION CENTERS AND OTHER ALCOHOL TREATMENT PROGRAMS IN MONTANA COUNTIES AND COMMUNITIES.

STANDARD 6.2
NO LATER THAN 1978, MONTANA COUNTIES AND CITIES SHOULD COLLECTIVELY OR INDIVIDUALLY PROVIDE DETOXIFICATION AND VOLUNTARY TREATMENT SERVICES THROUGH EXISTING REGIONAL OR COMMUNITY AGENCIES, OR THROUGH THE DEVELOPMENT OF NEW FACILITIES. REVENUE FOR THESE SERVICES SHALL COME FROM FEDERAL MONIES, STATE LIQUOR TAXES AS PROVIDED IN 6.1 AND OTHER PUBLIC AND PRIVATE SOURCES.

Cities and counties throughout Montana continually struggle to solve community alcohol abuse problems only to find that funding and program stability is difficult to sustain. Adequate, on-going funding is the most difficult problem faced by local governments.

This legislation is designed to strengthen existing laws concerning the distribution and use of liquor tax revenue.

At present, section 4-1-401, R.C.M., 1947, provides that 1/5 of all liquor tax revenue be deposited in the state general fund. The proposed amendment would require that this 1/5 portion be allocated specifically to the addictive disease division of the Department of Institutions.

The proposed amendment would also mandate that local governments deposit liquor tax revenue in earmarked accounts for use exclusively for funding detoxification centers and other alcohol treatment programs.

The proposed mandatory expenditure of liquor tax revenue would seem to enhance legislative intent concerning decriminalization of public drunkenness.

BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT AUTHORIZING AND DIRECTING THE DEPARTMENT OF REVENUE TO DISTRIBUTE 1/5 OF ALL LIQUOR LICENSE TAX REVENUES COLLECTED PURSUANT TO SECTION 4-1-401 R.C.M. 1947 TO THE ADDICTIVE DISEASES DIVISION OF THE DEPARTMENT OF INSTITUTIONS FOR THE FINANCING OF DETOXIFICATION CENTERS AND ALCOHOLISM PROGRAMS; AND DIRECTING MONTANA INCORPORATED CITIES, TOWNS AND COUNTIES TO SEPARATELY ACCOUNT FOR AND EXPEND 4/5 OF ALL LIQUOR LICENSE TAX REVENUES DISTRIBUTED TO THEM PURSUANT TO SECTION 4-1-401 R.C.M. 1947 FOR THE ESTABLISHMENT AND SUPPORT OF LOCAL DETOXIFICATION CENTERS AND ALCOHOL TREATMENT PROGRAMS; AMENDING SECTION 4-1-401 R.C.M. 1947; REPEALING SECTION 4-1-402 R.C.M. 1947.

Section 1. Section 4-1-401 R.C.M. 1947 is amended to read as follows: "4-1-401. License tax on liquor--amount--distribution of proceeds. The department of revenue is hereby authorized and directed to charge, receive and collect at the time of sale and delivery of any liquor under any provisions of the laws of the state of Montana a license tax of five per cent (5%) of the retail selling price on all liquor so sold and delivered. Said tax shall be charged and collected on all liquor brought into the state and taxed by the department of revenue. The retail selling price shall be computed by

adding to the cost of said liquor the state markup as designated by the department. Said five per cent (5%) license tax shall be figured in the same manner as the state excise tax and shall be in addition to said state excise tax. The department of revenue shall retain the amount of such five per cent (5%) license tax so received in a separate account. Four-fifths (4/5) of these revenues shall be distributed to the counties according to the amount of liquor purchased in each county. ~~One-fifth (1/5) of these revenues shall be deposited in the general fund.~~ One-fifth (1/5) of these revenues shall be distributed by the department of revenue to the addictive disease division of the department of institutions. Provided, however, in the case of purchases of liquor by a retail liquor licensee for use in his business, the department of revenue shall make such regulations as are necessary to apportion that portion of license tax so generated to the county where the licensed establishment is located, for use as provided in section 4-1-402 R.C.M. 1947. The department of revenue shall pay quarterly to each county treasurer the portion of the license tax due each county.

The county treasurer of each county shall retain one-fourth (1/4) of said license tax, and shall, within thirty (30) days after receipt thereof, apportion the remaining three-fourths (3/4) thereof to the treasurers of the incorporated cities and towns within his county, said apportionment to be based in each instance upon the proportion which the gross sale of liquor in such incor-

porated city or town bears to the gross sale of liquor in all of the incorporated cities and towns in his said county.

Section 2. There is a new R.C.M. section that reads as follows: Accounting for and utilization of license tax.

(a) All license tax monies distributed to the Alcohol and Drugs division of the department of institutions shall be separately identified and accounted for by the division and shall be used exclusively for financing programs of the Alcohol Services Bureau for detoxification centers and other alcohol treatment programs in Montana counties, cities and towns.

(b) Local county and city governments receiving funds under 4-1-401 R.C.M. 1947 shall provide for adequate and appropriate treatment for alcoholics and intoxicated persons. Treatment may be provided through contract with private profit or non-profit facilities, through facilities operated by individual local governments, through facilities operated by combinations of local government units or in any other manner approved by the Alcohol and Drugs division of the department of institutions.

(c) Local county and city governments and governmental agencies, and private agencies having as their primary function or goal the treatment of alcoholics and intoxicated persons through the establishment and advancement of alcoholism programs, may apply to the Alcohol and Drugs division of the department of institutions for financial funding and assistance

in establishing, developing and supporting detoxification centers and alcohol treatment programs.

(d) The department of institutions through its Alcohol and Addictive Drugs division shall promulgate rules and regulations for the periodic evaluation of the effectiveness of department funded detoxification centers and alcoholism programs. Such division evaluations shall be conducted for the purpose of determining whether or not the said centers and programs are accomplishing their objectives and goals in accordance with the policy of the State of Montana as stated in 69-6211 R.C.M. 1947 and shall serve as basis for future funding of such centers and programs.

Section 3. Section 4-1-402 R.C.M. 1947 is repealed.

- End -

RESEARCH NOTATION

State ex rel. City of Libby v. Haswell, 414 P2d 652, 147 Montana 492, held that cities lack the power to legislate in the field of liquor or beer since the state has pre-empted the field. Case supports the state's authority to mandate expenditure of liquor tax revenue at state and local levels.

USE OF PUBLIC SCHOOLS AS NEIGHBORHOOD SERVICE CENTERS

RECOMMENDATION 3-D

NO LATER THAN 1980, STATE SCHOOL OFFICIALS, LOCAL SCHOOL OFFICIALS, LOCAL SCHOOL BOARDS AND CITIZEN ACTION COUNCILS SHOULD CONSIDER ACTION TO DEVELOP SCHOOLS AS COMMUNITY SERVICE CENTERS AND TO DEVELOP VOLUNTEER CITIZEN LEADERSHIP IN SUCH CENTERS.

The task force determined that most school facilities were not being used by the community to their greatest potential; that most public school facilities were closed for several months each year.

Other standards describe specific community actions and programs which should be undertaken in cities and towns in an attempt to reduce crime. Such functions will require the use of public facilities such as school buildings.

The proposed legislation clarifies the authority of local school trustees to respond to the needs of the community through the use of public school buildings for civic, social and recreational activities which do not interfere with the regular conduct of school work.

BILL NO. _____

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING DISTRICT SCHOOL BOARD TRUSTEES THE AUTHORITY AND THE DUTY TO GRANT THE USE OF SCHOOL BUILDINGS AND FACILITIES FOR NONSCHOOL PURPOSES; PROVIDING THE USE OF THE BUILDINGS AND FACILITIES MAY BE GIVEN FOR A FEE OR MAY BE GIVEN GRATUITOUSLY; PROVIDING THAT THE USE SHALL NOT INTERFERE WITH THE REGULAR CONDUCT OF SCHOOL WORK: AMENDING SECTION 75-5933, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 75-5933, R.C.M. 1947, is amended to read as follows:

"75-5933. Powers and duties. As prescribed elsewhere in this title, the trustees of each district shall have the power and it shall be its duty to perform the following duties or acts:

(1) employ or dismiss a teacher, principal or other assistant upon the recommendation of the district superintendent, the county high school principal, or other principal as the board may deem necessary, accepting or rejecting such recommendation as the trustees shall in their sole discretion determine, in accordance with the provisions of the school personnel chapter of this title;

(2) administer the attendance and tuition provisions and otherwise govern the pupils of the district in accordance

with the provisions of the pupils chapter of this title;

(3) call, conduct and certify the elections of the district in accordance with the provisions of the school elections chapter of this title;

(4) participate in the teachers retirement system of the state of Montana in accordance with the provisions of the teachers retirement system chapter of this title;

(5) participate in district boundary change actions in accordance with the provisions of the districts chapter of this title;

(6) organize, open, close or acquire isolation status for the schools of the district in accordance with the provisions of the school organization chapter of this title;

(7) adopt and administer the annual budget or an emergency budget of the district in accordance with the provisions of the school budget system chapter of this title;

(8) conduct the fiscal business of the district in accordance with the provisions of the school financial administration chapter of this title;

(9) establish the ANB, foundation program, permissive levy, additional levy, cash reserve and state impact aid amount for the general fund of the district in accordance with the provisions of the general fund chapter of this title;

(10) establish, maintain, budget and finance the transportation program of the district in accordance with the provisions of the transportation chapter of this title;

(11) issue, refund, sell, budget and redeem the bonds of the district in accordance with the provisions of the

bonds chapter of this title;

(12) when applicable, establish, financially administer and budget for the tuition fund, retirement fund, building reserve fund, adult education fund, post-secondary vocational-technical center fund, nonoperating fund, school food services fund, miscellaneous federal program fund, building fund, housing and dormitory fund, traffic education fund and interlocal cooperative agreement fund in accordance with the provisions of the other school funds chapter of this title;

(13) when applicable, administer any interlocal cooperative agreement, gifts, legacies or devises in accordance with the provisions of the miscellaneous financial chapter of this title;

(14) hold in trust, acquire and dispose of the real and personal property of the district in accordance with the provisions of the school sites and facilities chapter of this title;

(15) operate the schools of the district in accordance with the provisions of the school calendar chapter of this title;

(16) establish and maintain the instructional services of the schools of the district in accordance with the provisions of the instructional services, textbooks, vocational education and special education chapters of this title;

(17) establish and maintain the school food services of the district in accordance with the provisions of the school food services chapter of this title;

(18) perform any other duty and enforce any other requirements for the government of the schools prescribed by this title, the policies of the board of education or the rules and regulations of the superintendent of public instruction;

(19) may require that all children at the time they are first enrolled in school, or within a reasonable time thereafter, be successfully immunized against those communicable diseases, as recommended by the State Department of Health and Environmental Sciences.

A child may be exempted from this requirement upon certification from a licensed physician stating that the physical condition of the child is such that the immunization would seriously endanger his life or health, or a written statement signed by one (1) parent or guardian that he is an adherent of a religious denominatin whose religious teaching are opposed to the immunization; and

(20) rent, lease or let any buildings or facilities of the district in accordance with the provisions of the school site and facilities chapter of this title and grant the use of these facilities, for a fee or gratuitously, for civic, social and recreational activities which do not interfere with the prime use thereof.

Section 2. There is a new R.C.M. section that reads as follows: Authority and duty of trustees to grant use of district property. The trustees of any district shall have the authority and duty to grant the use of school buildings

or facilities of the district, for a fee or gratuitously, for any civic, social and recreational activities the trustees deem proper. No use shall be inconsistant with the use of the buildings or facilities for school purposes, or interfere with the regular conduct of school work.

- End -

CODE OF ETHICS

RECOMMENDATION 5-B

THE LEGISLATURE SHOULD PASS LAWS WHICH WOULD IMPLEMENT DEFINITE ETHICAL STANDARDS FOR ALL CANDIDATES, PUBLIC OFFICIALS AND EMPLOYEES OF STATE AND LOCAL GOVERNMENTS

Article XIII, Section 4, of the 1973 Montana Constitution states:

> **"Code of ethics. The Legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees."**

The council did not attempt to provide suggested legislation. It did conduct research into codes of ethics enacted in other states, plus reviewing some case law on the matter.

This material is here included.

RESEARCH NOTATION
CODE OF ETHICS

PURPOSE AND REASONS FOR LEGISLATION: A continued problem of all free governments is the maintenance in public affairs of moral and ethical standards which are worthy and warrant the confidence of the people. One essential is that elected and appointed public officials must be men and women of high personal integrity. But even this is not a complete solution. This problem of ethical standards is not the simple issue of bribery and corruption on which there is no difference of opinion; it involves a whole range of border-line behavior, questions of propriety and the question of conflicts of interests.

A law review article written in 1972 states:

> "On the state level, in 1954, N.Y. adopted the first government ethics act. The N.Y. code set forth general standards of conduct to be used as guidelines for state officers and employees in the performance of their public duties. Finding this to be an excellent method of promoting proper ethical conduct, other states have adopted their own ethics acts."

In the footnote to that comment it is stated that a total of 24 states currently have some sort of ethics legislation — all of which provide for a specific code of legislative conduct. 22 De Paul L.R. 302,304 (1972).

Most states today have some type of election campaign legislation. The federal government has also passed legislation to prevent conflict of interests that may arise from self-dealing in an official capacity. 18 U.S.C. Sec. 201-204 (1970), See also, Exec. Order No. 11222, 3 C.F.R. 306 (1964-65 Comp.); 18 U.S.C. Sec. 201 (1970). The passage of state conflict of interest legislation has not been as widespread as election campaign laws, but recent developments indicate a trend in that direction.

5 Cum.-Sam. L.R. 183, **"The Alabama Ethics Act — Milestone or Millstone,"** (1974), from which most of the following information is taken, states that as to unethical behavior by public officials and employees, 20 states have, since 1961, enacted legislation which attempts to remedy this dilemma by establishing an ethical code administered by a commission or similar body. These are:

Ala. Code tit. 55, 327(24) (Supp. 1973)
Ariz. Rev. Stat. Ann. 38-561 (Supp. 1974)
Cal. Gov't Code 83100 (Cal. Leg. Serv. 1959 (1974))
Conn. Gen. Stat. Ann. 1-69 (1973)
Fla. Reg. Sess. Laws ch. 74-176, sec. 2 (1974) (to be codified as 112.320)
Hawaii Rev. Stat. 84-21 (Supp. 1973)
Ind. Ann. Stat. 2-2.1-3-5 & 4-2-6-2 (Burns Supp. 1974)
Iowa Code Ann. 68B.10 (1973)
Kan. Stat. Ann. 75-4303 (Supp. 1972), as amended Kan. Sess. Laws of 1974, ch. 353
Ky. Rev. Stat. Ann. 6.690 (Supp. 1973)
La. Rev. Stat. Ann. 42:1144 (1965)
Me. Rev. Stat. Ann. tit. 3, 381-A & 391 (Supp. 1974)
Md. Ann. Code art. 33, 29-7 (Supp. 1973)
Mich. Comp. Laws Ann. 15.343 (Supp. 1974)
Minn. Stat. Ann. 10A.02 (Supp. 1974)
N.J. Stat. Ann. 52:13D-21 (Supp. 1974)
Ohio Rev. Code Ann. 102.05 (Baldwin 1973)
Okla. Stat. Ann. tit. 74, 1408 (Supp. 1974)
Wash. Rev. Code 42.17.350 (Supp. 1973)
Wis. Stat. Ann. 11.01 et seq. & 15.62 (Supp. 1974)

An additional 14 states have enacted a code of ethics without providing for an ethics commission:

Ark. Stat. Ann. 12-3001 et seq. (Supp. 1973)
Ill. Ann. Stat. ch. 127 604A-101 et seq. (Smith-Hurd Supp. 1974)
Mass. Gen. Laws Ann. ch. 268A (1970)
Mo. Rev. Stat. 105.460 (1966)
Neb. Rev. Stat. 49-1106 (Cum. Supp. 1971)
N.M. Stat. Ann. 5-12-1 et seq. (1967)
N.Y. Pub. Officers Laws 74 et seq. (McKinney Supp. 1974)
Pa. Stat. Ann. tit. 46, 143.1 et seq. (1969)
S.D. Compiled Laws Ann. 12-25-28 (Special Supp. 1974)
Tenn. Code Ann. 8-4125 (1973)
Tex. Rev. Civ. Stat. art. 6252-9b (Supp. 1974)
Utah Code Ann. 67-16-7 (Supp. 1973)
Va. Code Ann. 2.1-347 et seq. (1973)
W. Va. Code Ann. 6B-1-1 (Supp. 1974)

Colorado also has an ethics code but, because

it was not created by legislation, the state is not included in this listing. On September 13, 1966, Governor John A. Love established, by executive order, the Colorado Code of Ethics.

An evident similarity in all ethics legislation is the emphasis placed on the overriding theme of protecting the public by eliminating conflicts of interests. Although the requirement for some type of financial disclosure statement by public officials and employees is a common thread, the means employed to achieve this objective are diverse. No two states require the same category of officials and employees to disclose their financial interests and no two states provide the same penalties for non-disclosure or incomplete reporting.

Another important difference concerns who has access to these statements. Examples here are Alabama, which makes financial disclosure statements a matter of public record — and Hawaii, which provides that the information on the disclosure form be confidential and available only to those who are in a position to analyze it in an unbiased fashion in the event of a supposed conflict.

Generally speaking, all ethics legislation includes provision for the protection of the public interest and definitions of circumstances which may constitute a conflict of interest situation. Validity of these hinges on a judicial balancing of individual freedoms guaranteed by the first and fourth amendments against the public's right to know facts of public interest. One of the most significant early court cases arose in Illinois after passage of their first ethics act. The supreme court of Illinois ruled that the state's ethics act, which required public officials to disclose certain economic interests, was neither overbroad nor an unconstitutional invasion of personal rights. **Stein v. Howlett,** 52 Ill. 2d 570,, 299 N.E. 2d 409 (1972). Nor was the act ruled vague as the court held that it was explicit enough to inform those individuals affected.

In **County of Nevada v. MacMillen,** 11 Cal. 3d 662, 522 P. 2d 345 (1974), the Calif. supreme court concluded that a second ethics act, passed to meet the shortcomings of an earlier one, was neither unconstitutionally vague or overbroad nor an invasion of privacy. The second act limited the means employed to achieve its purpose and was concerned only with substantial conflicts of interest which might result in private economic gain to certain high-level officials.

The Wash. supreme court ruled the state financial disclosure and reporting law for public officials, candidates and lobbyists to be constitutionally permissable. **Fritz v. Garton,** 83 Wash 2d 275, 517 P. 2d 911, appeal dismissed 94 S. Ct. 2596 (1974). The court noted that the public had the right to review information which directly reflects upon the fitness and qualifications of those who seek to hold public office, and that this public demand outweighs the claimed rights of privacy.

On the federal level, the supreme court has also indicated that individual freedoms must give way to legitimate government interest if the governments means in protecting that interest are reasonably limited. For example, the Federal Election Campaign Act, regulating and requiring public disclosure of reports on campaign expenditures and contributions, has been attacked as an unconstitutional restriction of the freedoms of expression and association. **Pichler v. Jennings,** 347 F. Supp. 1061 (S.D.N.Y. 1972). The court rejected the attack, but indicated some future attack might establish a violation, if it demonstrated that the disclosures inhibit an individuals political involvement in elections in fear of economic or physical reprisals from the community thus jeopardizing first amendment rights. However, the supreme court of Georgia, presented with facts which the New York court recognized hypothetically as a possible first amendment abridgement, ruled that "balancing governmental interest in protecting the integrity of the democratic process and to insure fair elections against an individual's fundamental right . . . the limited intrusion here is constitutionally permissible." **Fortson v. Weeks,** __Ga.__, 208 S.E. 2d 68, 76 (1974).

The U.S. supreme court has ruled that there exists an overriding government interest in requiring teachers, lobbyists and lawyers to disclose various facts related to the governmental interest before they are granted the privilege to practice their profession within the state. **United States v. Harriss,** 347 U.S. 612 (1954) (as to lobbyists).

The author of the Law Review article on the Alabama Ethics Act stated in his conclusion on p. 212:

> ". . . the holding of public office is not a right but a privilege. If one accepts the benefits of serving the public, he must also meet the standards of conduct which the public requires. He is responsible for the public welfare and therefore he should and

must be subject to public scrutiny. In essence, the Ethics Act merely requires the public official or employee to divorce himself of private motivations while acting in the public behalf. This requirement is no more stringent than that which a scrupulous official or employee would set for himself were there no law in force."

APPENDIX

APPENDIX A

TASK FORCE STANDARDS AND RECOMMENDATIONS ADOPTED BY THE MONTANA COUNCIL ON CRIMINAL JUSTICE STANDARDS AND GOALS.

TASK FORCE STANDARDS AND RECOMMENDATIONS ADOPTED BY THE MONTANA COUNCIL ON CRIMINAL JUSTICE STANDARDS AND GOALS

LAW ENFORCEMENT

Standards	Titles
1.1	State Mandated Minimum Basic Training
1.2	State Reimbursement for Mandated Training
1.3	Montana Law Enforcement Academy Funding
1.4	Probationary Officer Training
1.5	In-service Training
1.6	Training Course Certification
1.7	Criminal Justice Training Centers
1.8	Peace Officers Standards and Training Funding
2.1	The Division of Forensic Science
2.2	The Board of Forensic Science
2.3	The Laboratory of Criminalistics
2.4	The Office of Forensic Pathology
3.1	The Selection Process
3.2	Background Investigations
4.1	Residency Requirements
4.2	Employment Application Procedures
4.3	Minority Recruiting
4.4	Recruitment of Women
6.1	Responsibility for Law Enforcement Service
6.2	Commitment to Planning
6.3	Community Security Planning
6.4	Assisting a Peace Officer
6.5	Combined Law Enforcement Services
8.1	Juvenile Operations

Recommendations	Titles
1-A	Program Development
1-B	Preparatory Training — I
1-C	Preparatory Training — II
1-D	Interpersonal Communications Training
1-E	Law Enforcement Community Communication
1-F	In-service Training Record
1-G	Training Availability
1-H	Peace Officers Standards and Training

LAW ENFORCEMENT *(continued)*

Recommendations	Titles
3-A	Psychological Testing
3-B	Interim Employment
4-A	Recruitment Program Administration
4-B	College Recruitment
4-C	College Intern Program
4-D	Recruitment Balance
5-A	Formal Education — I
5-B	Formal Education — II
5-C	Formal Education — III
5-D	Educational Incentives
5-E	College Credit for Law Enforcement Training Programs
6-A	Organizational Structure
6-B	Consolidation of Law Enforcement Services
6-C	Responsibility for Fiscal Management
7-A	Entry Level Salary
7-B	Salary Classification
7-C	Salary Structure
7-D	Salary Separation
8-A	Agency Juvenile Policy
8-B	Juvenile Investigation Unit

COURTS

Standards	Titles
1.1	Criteria for Screening
1.2	Procedure for Screening
2.1	Criteria for Diversion
2.2	Procedures for Diversion
3.1	Consideration of Plea
3.2	Responsibilities of the Prosecutor
3.3	Responsibilities of the Trial Judge
4.1	Time Frame for Prompt Processing of Criminal Cases
4.2	Use of Citations in Lieu of Detention
4.3	Use of Summons in Lieu of Detention
4.4	Pretrial Release

COURTS (continued)

Standards	Titles
4.5	Presentation Before Judicial Officer Following Arrest
4.6	Pretrial Discovery
4.7	Responsibilities of Trial Court and of Counsel
4.8	Pretrial Motions and Conference
4.9	Trial of Criminal Cases
4.10	The Grand Judy
4.11	Continuances
5.1	The Courts Role in Sentencing
5.2	Sentencing to Extended Terms
5.3	Multiple Sentences
6.1	Unified Review Proceeding
6.2	Professional Staff
6.3	Flexible Review Procedures
6.4	Dispositional Time in Reviewing Court
6.5	Exceptional Circumstances Justifying Further Review
6.6	Further Review Within the Same Court System: Prior Adjudication
6.7	Further Review in State or Federal Court: Prior Factual Determinations and Claims Not Asserted Previously
6.8	Stating Reasons for Decisions
7.1	Judicial Selection and Tenure
7.2	Judicial Compensation
7.3	Removal and Discipline
7.4	Judicial Education
8.1A	Unification of the State Court System
8.2A	Summary Disposition of Certain Matters Now Treated as Criminal Offenses
9.1	State Court Administrator
9.2	Presiding Judge and Administrative Policy of the Trial Court
9.3	Local and Regional Trial Court Administrators
9.4	Caseflow Management
9.5	Coordinating Councils
10.1	Courthouse Physical Facilities
10.2	Court Public Information and Education Programs
10.3	Production of Witnesses
10.4	Compensation of Witnesses
11.1	Professional Standards for Prosecutors and Assistant Prosecutors
11.2	Supporting Staff and Facilities

COURTS (continued)

Standards	Titles
11.3	Continued Education of Professional Personnel
11.4	Statewide Organization of Prosecutors
11.5	Development and Review of Office Policies
11.6	The Prosecutors Investigative Role
11.7	Prosecutor Relationships With the Public and With Other Agencies of the Criminal Justice System
12.1	Availability of Publicly Financed Representation in Criminal Cases
12.2	Financing and Payment for Defense Services
12.3	Initial Contact With Client
12.4	Defender to be Full-time and Adequately Compensated
12.5	Performance of Public Defender Function
12.6	Providing Assigned Counsel
12.7	Community Relations
14.1	Statewide Investigation and Prosecution
14.2	Automated Legal Research

Recommendations	Titles
4-A	Court Appearance Apprehension Units
6-A	Transcript Preparation

CORRECTIONS

Standards	Titles
1.1	Policy of Corrections
1.2	Unifying Correctional Programs
1.3	Commitment Legislation
1.4	Juvenile Status Offenders
2.1	Access to Courts
2.2	Access to Legal Services (Council Version)
2.3	Access to Legal Materials
2.4	Protection Against Personal Abuse
2.5	Healthful Surroundings
2.6	Medical Care
2.7	Searches
2.8	Equal Treatment
2.9	Rehabilitation
2.10	Retention and Restoration of Rights (Council Version)
2.11	Rules of Conduct
2.12	Disciplinary Procedures
2.13	Juvenile Disciplinary Procedures

CORRECTIONS (continued)

Standards	Titles
2.14	Procedures for Nondisciplinary Changes in Status
2.15	Grievance Procedure
2.16	Free Expression and Association
2.17	Exercise of Religious Beliefs and Practices
2.18	Access to the Public
2.19	Remedies for Violation of an Offender's Rights
3.1	Use of Diversion
3.2	Decisionmaking in Individual Cases
3.3	Role of Police in Juvenile Intake and Detention (Council Version)
4.1	Construction Policy for Pretrial Detention Facilities
4.2	Alternatives to Pretrial Detention
4.3	Persons Unfit to Proceed with Trial
4.4	Incompetency Examination
5.1	Sentencing the Nondangerous Offender
5.3	Probation
5.4	Fines
5.6	Credit for Time Served
5.7	Judicial Visits to Institutions
5.8	Sentencing Institutes
5.9	Presentence Report
5.10	Disclosure of Presentence Report
5.11	Sentencing Hearing — Rights of Defendant
5.12	Imposition of Sentence (Standards 5.2 and 5.5 were rejected by council)
6.1	Classification of Offenders
6.2	Classification for Inmate Management
6.3	Community Classification Teams (Council Version)
7.1	Development Plan for Community Based Alternatives to Confinement
7.2	Inmate Involvement in Community Programs (Council Version)
7.3	Public Information
8.1	Total System Planning
8.2	State Inspection of Local Facilities
8.3	Pretrial Detention Admission Process
8.4	Staffing
8.5	Jail Release Programs
8.6	Local Facility Evaluation and Planning

CORRECTIONS (continued)

Standards	Titles
9.1	Organization of Adult Probation Services
9.2	Services to Probationers
9.3	Misdemeanant Probation
10.1	Planning New Correctional Institutions
10.2	Modification of Existing Institutions
10.3	Special Offender Types
10.4	Religious Programs
10.5	Recreation Programs
10.6	Counseling Programs
10.7	Incarcerated Women
11.1	Parole Authority Personnel (Council Version)
11.2	The Parole Grant Hearing
11.3	Parole Revocation Hearings (Council Version)
11.4	Community Services for Parolees
11.5	Measures of Control
11.6	Manpower for Parole
12.1	Professional Correctional Management
13.1	Recruitment from Minority Groups
13.2	Employment of Women
13.3	Employment of Ex-offenders
13.4	Utilization of Volunteers
13.5	Personnel Practices
13.6	Criminal Justice Education
13.7	Intern and Work-Study Programs
13.8	Training
14.1	Definition of Recidivism
14.2	Evaluating the Performance of the Correctional System

Recommendations	Titles
1-A	Comprehensive Correctional Legislation
4-A	Pretrial Detention Process Planning
4-B	Procedures Relating to Pretrial Release and Detention Decisions
4-C	Rights of Pretrial Detainees
4-D	Programs for Pretrial Detainees
7-A	Marshaling and Coordinating Community Resources
7-B	Correction's Responsibility for Citizen Involvement
8-A	State Coordination of Local Institutions
8-B	Adult Intake Services

CORRECTIONS (continued)

Recommendations	Titles
10-A	Social Environment of Institutions
10-B	Educational and Vocational Training
10-C	Correctional Programming and Policies
11-A	Organization of Paroling Authorities
12-A	Planning and Organizing
12-B	Employee-Management Relations
12-C	Work Stoppages and Job Actions
13-A	Participatory Management
13-B	Recruiting and Retaining Professional Personnel
14-A	Development of a Correctional Data Base

INFORMATION SYSTEMS

Standards	Titles
1.1	Coordination of Information Systems Development
1.2	System Planning
1.3	Uniform Classification of Data
1.4	Expansion of Criminal Justice Data Base
1.5	Montana's Role in Criminal Justice Information and Statistics
1.6	Local Criminal Justice Information Sys-
1.7	Criminal Justice Component Information Systems tems
1.8	The Establishment of Criminal Justice User Groups
2.1	Police Information Systems
2.2	Police Information System User Groups
2.3	Police Information System Response Time
2.4	UCR Participation
2.5	Expanded Crime Data
2.6	Quality Control of Crime Data
2.7	Crime Analysis Capability
2.8	Manpower Resources Allocation and Control
2.9	Geocoding
2.10	Police Reporting
2.11	Arrest Warrants
2.12	Police Telecommunications
3.1	Decisionmaking in Individual Cases
3.2	Calendar Management in the Courts
3.3	Pretrial Offender Status
3.4	Court Management Data

INFORMATION SYSTEMS (continued)

Standards	Titles
3.5	Case Management for Prosecutors
3.6	Prosecutor Information System
3.7	Automated Legal Research
4.1	Development of a Corrections Information System
4.2	Operation of a State Correctional Information System
4.3	Offender Statistical Data
4.4	Corrections Population and Movement
4.5	Corrections History Data
5.1	Data Elements for OBTS and CCH Records
5.2	Criminal Justice Agency Collection of OBTS/CCH Data
5.3	Triggering Criminal History Data Collection and Dissemination
5.4	Separation of Computerized Files
5.5	Establishment of Computer Interfaces for Criminal Justice Information Systems
5.6	The Availability of Criminal Justice Information Systems
5.7	Completeness and Accuracy of Offender Data
5.8	Purging
5.9	Purging Procedures
5.10	Frequency of Purging
5.11	Availability of Purged Records
5.12	Notification of Purging and Indexes to Purged Records
6.1	Security and Privacy Administration
6.2	Access and Dissemination
6.3	Information Review
6.4	Data Sensitivity Classification
6.5	System Security
6.6	Personnel Clearances
6.7	Information for Research
7.1	Standardized Terminology
7.2	System Development
7.3	Communication

Recommendations	Titles
2-A	Intra-agency Reporting
2-B	Critical Information Groups
3-A	Filing Procedures and Statistical Systems
3-B	Instruction in Automated Legal Research Systems

COMMUNITY CRIME PREVENTION

Standards	Titles
1.1	Citizen Action Councils
1.2	Community Facilities
2.1	Inventory of Community Services
2.2	Emergency Community Services
2.3	Universal Emergency Telephone Number
2.4	Adult and Juvenile Diversion Programs
2.5	Role of Law Enforcement and Community in Combatting Crime
2.6	Law Enforcement/Community Relations
2.7	Rape Prevention and Treatment
2.8	Standard Building Security Code
3.1	REJECTED. See recommendation 3-D
3.2	Flexibility in Curriculum
3.3	Alternative Education Programs
3.4	Community Involvement in Education
4.1	Family Help Services
4.2	Job Opportunities
4.3	Recreational Opportunities
5.1	Increasing Citizen Contact with Government (Council Version)
5.2	REJECTED. See recommendation 5-B
5.3	Restoring Confidence in the Criminal Justice System
5.4	Code Review Committees
6.1	Liquor Tax Revenue
6.2	Detoxification
6.3	Drug and Alcohol Abuse Treatment Follow-up
7.1	Perinatal Care Courses
7.2	Information and Treatment Regarding Child Abuse and Neglect
7.3	Alternate Care and Follow-up

COMMUNITY CRIME PREVENTION
(continued)

Recommendations	Titles
1-A	Local Government
1-B	Youth
1-C	Civic and Community Service Groups
1-D	Churches and Religious Organizations
1-E	Low-Income Citizens
1-F	Minority Citizens
2-A	Crisis Centers
2-B	Consumer Fraud Prevention
2-C	Insurance Dividends for Crime Prevention Protection
3-A	Improving Basic Skills
3-B	Life-time Skills Education
3-C	Nurturing Human Growth in Education
3-D	Schools as Neighborhood Service Centers (Council Version)
4-A	Equal Employment Opportunity (Council Version)
5-A	Economic Crime
5-B	Conduct Codes for Political Candidates, Public Officials and Government Employees (Council Version)
6-A	Alcohol and Drug Abuse Education
6-B	Marijuana

APPENDIX B

MINORITY REPORT IN OPPOSITION TO COURTS STANDARD 8.1

Minority Report in Opposition to Courts Standard 8.1

"LOWER COURTS - UNIFICATION"

I submit the following standard as a replacement for the present Standard 8.1. The specific emphasis of my proposed standard is the upgrading and retention of the present lower court system rather than the incorporation of it into the trial court system as recommended in Standard 8.1.

Signed:

Leland P. Christopherson

P. E. Peres

Jewel T. Dunbar

Pat Watkins

John C. Kuhl

Eugene A. Ford

Don T. Holladay

Franklin Hawley

STANDARD 8.1

ALL JUDGES OF COURTS OF LIMITED JURISDICTION, SHALL COMPLETE AT LEAST A ONE WEEK COURSE OF JUDICIAL EDUCATION STUDY EVERY TWO YEARS, WITH MANDATORY ATTENDANCE AT ALL SESSIONS. THE FAILURE OF ANY JUDGE, WITHOUT GOOD CAUSE, TO PURSUE EDUCATIONAL PROGRAMS AS PRESCRIBED IN THIS STANDARD SHALL BE CONSIDERED AS GROUNDS FOR DISCIPLINE OR REMOVAL.

ALL COURTS OF LIMITED JURISDICTION SHALL BE PROVIDED FACILITIES FOR LEGAL TAPE RECORDING OF THE PROCEEDINGS OF ARRAIGNMENT, HEARING, EXAMINATION, AND TRIALS, TO MAKE AVAILABLE A RECORD OF SUCH PROCEEDINGS WHEN NECESSARY FOR APPEAL PURPOSES, SO THAT A NEW COMPLETE TRIAL IS NOT NECESSARY IN THE DISTRICT COURTS.

THERE SHALL BE A STATE ADMINISTRATOR FOR THE COURTS OF LIMITED JURISDICTION, TO PROVIDE INFORMATION AND PROCEDURAL MANUALS, TO COORDINATE TRAINING, AND PROVIDE A CENTRAL DOCKET REPORTING OF ALL CASES HANDLED.

ANY JUDGE OF LIMITED JURISDICTION THAT HAS A DOCKET CASE LOAD OF 1700 TO 5000 CASES PER YEAR SHALL BE A FULL TIME JUDGE. ANY AREA WHOSE COURTS OF LIMITED JURISDICTION HAVE A DOCKET CASE LOAD OF OVER 5000 CASES PER YEAR, PER COURT, SHALL PROVIDE ADDITIONAL JUDGES.

THE SALARY OF ALL FULL TIME JUDGES OF COURTS OF LIMITED JURISDICTION SHALL BE AT LEAST THE SAME AS THE SALARY OF OTHER ELECTED FULL TIME COUNTY OFFICIALS. NO JUDGE OF A COURT OF LIMITED JURISDICTION SHALL HAVE A PRIVATE PRACTICE OF LAW.

APPENDIX C

CONSTITUTIONALITY OF THE DEATH PENALTY IN MONTANA

CONSTITUTIONALITY OF THE DEATH PENALTY IN MONTANA

Montana's mandatory death penalty provisions, section 94-5-105 (2), R.C.M. (1947), dealing with deliberate homicide involving the killing of a police officer, and Section 94-5-304, R.C.M., (1947), dealing with aggravated kidnapping where the victim is dead as a result of the criminal conduct, are unequivocally unconstitutional. Montana's discretionary death penalty provision, Section 94-5-105 (1) (a) through (e) dealing with sentence of death for enumerated categories of deliberate homicide and providing for consideration of mitigating circumstances, is constitutional.

It is **possible** that Montana's procedures for review of death sentences are constitutionally inadequate so as to render **any** imposition of the death penalty unconstitutional whether it be imposed pursuant to the mandatory or discretionary death penalty provisions.

INTRODUCTION

The purpose of this writing is to assess the constitutionality of Montana's death penalty statutes relating to the crimes of deliberate homicide, Section 94-5-105, and aggrevated kidnaping, Section 94-5-304, R.C.M. 1947, in light of the recent U.S. Supreme Court cases dealing with the subject. See: **Gregg v Georgia,** ____U.S.____, 96 S. Ct. 2909 (1976); **Proffitt vs. Florida,** ____U.S ____, 96 S. Ct. 2960 (1976); **Jurek v. Texas,** ____U.S.____, 96 S. Ct. 2950 (1976); **Woodson v. North Carolina,** ____U.S____, 96 S. Ct. 2978 (1976); and **Roberts v. Louisiana,** ____U.S.____, 96 S. Ct. 3001 (1976).

It should be noted that the proposed legislation is more than an attempt to cure the obvious or definite constitutional defects in the existing law. Rather, it represents an attempt to completely overhaul the procedures utilized in determining when and upon whom the death penalty is to be imposed. In other words, the decision to change or add to a particular existing provision was not based solely on that particular provision's ability to pass constitutional muster should it be tested in the U.S. Supreme Court, but also upon a desire to improve the procedure involved to insure that such an ominous penalty as death is fairly and justly meted out.

THE DEATH PENALTY PER SE

The five recent Supreme Court cases on the constitutionality of the death penalty address and answer many questions left unanswered by the voluminous and confusing plurality opinion in **Furman v. Georgia,** 408 U.S. 238 (1972). Assuming no radical changes in the philosophy or membership of the court in the near future it now appears clear that the punishment of death for the crime of murder is **not** constitutionally invalid per se under the 8th and 14th amendments to the U.S. Constitution. The 8th amendment, according to the court is flexible, and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." **Gregg v. Georgia,** 96 S. Ct. at p. 2925. The court viewed post-Furman enactment by 35 states of new death penalty statutes as strong evidence of society's endorsement of the death penalty and as an indication of current "standards of decency". **Gregg v. Georgia,** at p. 2928. Acknowledging that retribution and deterrence remain valid sentencing considerations, the court expressed what should be the final word on the constitutionality of the death penalty per se:

> "We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it". Gregg v. Georgia, at p. 2932.

PROCEDURAL CONSIDERATIONS IN IMPOSING THE DEATH PENALTY — CONSTITUTIONALLY MANDATED REQUIREMENTS AND ACCEPTABLE METHODS OF FULFILLING THEM.

Having decided that the death penalty is not, per se, unconstitutional cruel and unusual punishment under the 8th and 14th amendments, a more detailed analysis of the procedural requirements deemed necessary by the court in order to constitutionally impose the penalty is necessary. The following discussion attempts to treat the various procedural provisions of the constitutionally approved death penalty statutes of Georgia, Texas, and Florida both in terms of what the Supreme Court considers to be mandatory constitutional prerequisites and what it considers to be adequate or desirable approaches or procedures.

The Georgia statutory procedure held constitutional in **Gregg v. Georgia,** supra, sets out the various procedural requirements dealt with in all three cases. These are:

(1) jury sentencing;

(2) a bifurcated procedure for determining guilt and punishment;

(3) a consideration by the sentencing body of enumerated aggravating factors, one of which must be found in order to impose the death sentence, and any mitigating factors (not enumerated in Georgia);

(4) an automatic review procedure requiring the state supreme court to review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. (See: **Gregg v. Georgia,** 96 S. Ct. 2932-2941, and Ga. Code Ann. § 27-2534.1 and § 27-2537).

It is apparent that the procedure of jury sentencing, although present in Georgia's constitutionally approved statutory scheme, is not a constitutional requirement. The Florida procedure, also held constitutional, (see: **Proffit v. Florida,** supra) provides only for an advisory opinion by the jury as to the sentence, while the actual sentence is determined by the judge. The court makes this clear in **Proffit v. Florida,** 96 S. Ct. at j. 2966, where it stated:

> "This court has pointed out that jury sentencing in a capital case can perform an important societal function, (citation omitted), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, . . ."

Therefore, the fact that all sentences in Montana are imposed by a judge pursuant to section 95-2212, R.C.M. (1947) does not present a procedural problem in constitutionally imposing the death sentence. The proposed legislation, therefore, does not make any change in this area since it would amount to a radical and unnecessary change in Montana's criminal procedure.

The Georgia, Texas, and Florida procedures all provided for a bifurcated proceeding, i.e., separate and distinct proceedings for determining guilt on the one hand and punishment on the other. However this requirement can best be viewed as being constitutionally required only in states where the jury is included in the sentencing process as a sentencing or advisory body. In such a system as the court points out in **Gregg v. Georgia,** 96 S. Ct. at p. 2933:

> "Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."

And at 96 S. Ct. p. 2935, the court further states:

> "As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information".

This infirmity is not present in a judicial sentencing jurisdiction such as Montana where the procedure is automatically bifurcated due to the separate functions of judge and jury in fixing guilt and determining punishment. In general, as a matter of necessity and practice, a separate sentencing hearing is held in Montana's district courts, however, for clarity, the proposed legislation expressly requires a separate sentencing hearing and specifies what is to be considered at that hearing. Although perhaps not constitutionally required due to the use of judicial rather than jury sentencing in Montana, the provisions (sections 1 and 2 of the proposed legislation) were considered desirable as procedural guidelines for a comprehensive statutory scheme for the imposition of the death penalty in Montana.

If there is one immutable constitutional principal that rings crystal clear from a reading of the five recent Supreme Court decisions on the death penalty being considered herein, it is that any state which desires to impose the death penalty must as an integral part of its procedure for imposing the penalty, provide for the consideration of the character and propensities of the individual offender and the circumstances of the particular offense. The statutes of Georgia, Texas, and Florida approved by the court had met this constitutional requirement by providing that the sentencer consider both aggravating and mitigating

circumstances relating to the offense and the offender before passing a sentence of death. All three of the states' statutes enumerated aggravating factors which narrowed the situations in which the death penalty could be imposed based on either the nature of the offender or the offense. The Montana statute concerning the death sentence for deliberate homicide, 94-5-105, and the statute concerning sentence of death for the narrow category of kidnaping in which the victim is dead as a result of the criminal conduct, 94-5-304, therefore appear constitutionally adequate in this regard. Whether or not specific mitigating factors have to be statutorily enumerated is another question, however. It appears that the answer is no, since only the Florida statute contained such an enumeration, (see: Fla. Stat. Ann. § 921.141) while the Georgia statute mentioned consideration of mitigating factors only in a general sense without enumerating them (see: Ga. Code Ann. § 27-2534.1), and the Texas statute did not even expressly speak of consideration of mitigating circumstances but was only construed to include such consideration by the Texas Court of Criminal appeals (see: Texas Penal Code § 19.03 and Texas Code of Crim. Proc., Art. 37.071). It is equally evident, however, that although mitigating factors need not be statutorily enumerated, **they must be allowed to be considered** in determining sentence. The court articulated this constitutitonal requirement in **Jurek v. Texas,** 96 S. Ct. at p. 2956 where, it stated:

> " . . . a sentencing system that allowed the jury to consider only aggravating factors would almost certainly fall short of providing the individualized sentencing determination that we today have held in **Woodson v. North Carolina,** (citation omitted) to be required by the Eight and Fourteenth Amendments. . . . Thus, in order to meet the requirements of the Eighth and Fourteenth Amendments, a capital sentencing system must allow the sentencing authority to consider mitigating circumstances."

Turning again to the Montana statutes, it appears that this constitutionally mandated procedural requirement is adequately provided for in the case of section 94-5-105 (1) (a) through (e) but fatally absent in sections 94-5-105 (2) and 94-5-304. The provision in 94-5-105 (1) which provides for imposition of the death sentence for enumerated types of deliberate homicide "unless there are mitigating circumstances" has unwittingly salvaged the constitutionality of that section, while the removal of such language by amendment in 1974 in regard to the killing of a police officer (94-5-105 (2)) and aggravated kitnaping where the victim is killed (94-5-304) has rendered those provisions unconstitutional under the recent cases.

The proposed legislation adopts the Florida scheme of enumerating specific mitigating factors which are to be considered in imposing the death penalty. As has already been noted, this is probably not constitutionally required, but in both Georgia (see: **Coley v. State,** 231 Ga. 829, 834, 204 S.E. 2nd 612, 615) and Texas (see: **Jurek v. Texas,** 522 S.W. 2nd 939, 940) where mitigating factors were not enumerated, they were supplied by judicial construction or interpretation. Due to this fact and the heavy emphasis which the Supreme Court places on the necessity of providing the sentencing authority with adequate standards and guidelines to insure objective consideration of the particularized circumstances of the individual offense and offender, the adoption of an enumerated list of mitigating circumstances was deemed a desirable change in the Montana law.

The last, but certainly not the least, of the procedural requirements discussed by the court is that of automatic appeal or review of death sentences. All three of the statutory schemes approved by the cases provide for this type of automatic expeditious review. (See: Ga. Code Ann. § 27-2537, Fla. Stat. Ann. § 921.141 (4) and Texas Code of Crim. Proc., Art. 37.071). Whether or not a special type of "automatic" review of all death sentences is constitutionally mandated under the 8th and 14th amendments is not entirely clear from reading the decisions. At the very least, however, the court expresses an extremely strong preference for the utilization of such a review procedure. Speaking of the Georgia statute which specifies that "automatic" review shall consist of a determination of whether the death sentence was imposed under the influence of passion and prejudice or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, the court in **Gregg v. Georgia,** 96 S. Ct. at p. 2940 stated:

> "The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty."

In the case of the Florida statute which provides for automatic review but does not specify a par-

ticular type or form of review, the court noted in **Proffitt v. Florida,** 96 S. Ct. 96 at p. 2966 that since "the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each such sentence is made possible". The court also noted the Florida Supreme Court case of **State v. Dixon,** 283 So. 2d 1, (1973), which adopted the concept of proportionality review in death sentence cases. In that case, the Florida Supreme Court considered its function to be to:

> "guarantee . . . that the (aggravating and mitigating) reasons present in one case will reach a similar result to that reached under similar circumstances in another case . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." **State v. Nixon,** at p. 10.

The question is, then, are the existing avenues of review and appeal, now open to the recipient of the death penalty in Montana, constitutionally adequate? The two forms of review available in Montana are direct appeal pursuant to Chapter 24, Title 95, R.C.M. (1947) and sentence review before the Montana Sentence Review Division pursuant to Chapter 25, Title 95, R.C.M. (1947). To begin with, neither of these methods of review is automatic. They both must be initiated and perfected by the convicted defendant, and secondly they do not specify any guidelines, (as did the Georgia statute), as to what factors are to be reviewed in order to insure that the death penalty is not imposed arbitrarily or freakishly. One might successfully argue that, despite these insufficiencies, Montana's provisions are adequate as applied on a case by case basis. That is, if a person under sentence of death is in fact given an appeal or sentence review, and if the reviewing body does in fact conduct a comparison or proportionality type of review to insure that the sentence is not disproportionate to those imposed in similar cases, then the sentence of death in the particular case is constitutionally valid since a "meaningful" appellate review as required by the Supreme Court cases has in fact been afforded. However, in order to avoid this problem of interpretation and due to the emphasis placed by the court upon the need for extraordinary safeguards and procedures to fairly impose the death penalty due to the inherently "unique" and "final" nature of the penalty it was considered both necessary and desirable to create for Montana a special "automatic" review procedure to be utilized in death sentence cases. The proposed legislation provides that the Montana Supreme Court conduct this review, rather than the Sentence Review Division due again to the serious nature of the penalty being reviewed. It should be noted that the procedure adopted in the proposed bill is not carved in stone since there are many conceivable ways of insuring the type of meaningful review required by the U.S. Supreme Court. The procedure adopted is, however, patterned after the Georgia procedure for which the Court expressed a marked preference.

CONSTITUTIONALITY OF MANDATORY DEATH PENALTY STATUTES — MONTANA'S MANDATORY PROVISIONS FOR KIDNAPING *(94-5-304)* AND KILLING A PEACE OFFICER *(94-5-105(2))*.

Subsequent to **Furman v. Georgia,** supra, which held that because of the uniqueness of the death penalty it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an "arbitrary", "capricious" or "freakish" manner, the states were left with the problem of interpreting the nine separate opinions of the case in order to discover what constitutional requirements must be met in order to retain and impose the death penalty. The various states have adopted two basic approaches in the attempt to comply with the pronouncements of the **Furman** decision. The first approach was characterized by specifying the factors to be weighed and the procedures to be followed in imposing the death sentence, and the second by making the death penalty mandatory for specified crimes. (See: **Gregg v. Georgia,** supra, p. 2928, footnote 23 for complete citations to all state post-Furman statutes). In view of **Woodson v. North Carolina,** and **Roberts v. Louisiana,** supra, it is apparent that the latter approach of making the death penalty mandatory is unconstitutional under the 8th and 14th amendments. In these two cases the court was dealing with mandatory death penalty statutes for specific types of crimes or categories of crime. Addressing the constitutionality of the North Carolina statute the court said:

> "A separate deficiency of North Carolina's mandatory death sentence statute is its failure to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences. Central to the **limited** holding in Furman was the conviction that the vesting of **standardless** sentencing power in the jury violated the Eighth and

Fourteenth Amendments." **Woodson ..v. North Carolina,** at p. 2990. (emphasis added)

It is thus apparent from **Woodson** that the **Furman** decision is to be interpreted as a limited holding condemning only the "standardless" exercise of discretion and not the mere existance of discretion in the sentencing process. In the words of the court, "mandatory statutes in response to Furman have simply papered over the problem of unguided and unchecked jury discretion". **Woodson v. North Carolina** at p. 2990. The common misconception that mandatory death penalties were the answer to **Furman** is emphatically refuted in **Woodson v. North Carolina** at p. 2991 where the court stated:

> "While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death it does **not** fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."

Perhaps the greatest constitutional defect inherent in the mandatory death penalty statutes condemned by the court was their failure to allow the particularized consideration of the individual offender and the circumstances of the offense. In the words of the court:

> " . . . we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, (citation omitted), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death". **Woodson v. North Carolina,** at p. 2991.

In **Roberts v. Louisiana,** the same basic issue was resolved in the same manner. There, however, the court was confronted with a mandatory death penalty statute which was significantly more limited in its scope of application in that it limited the mandatory death penalty to five categories of homicide. Here again, however, the court struck down the statute, stating at 96 S. Ct. 3006:

> "The constitutional vice of mandatory death sentence statutes—lack of focus on the circumstances of the particular offense and the character and propensities of the offender —is not resolved by Louisiana's limitation of first degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first-degree murder in the Louisiana law afford no meaningful opportunity for consideration of **mitigating factors** presented by the circumstances of the particular crime or by the attributes of the individual offender. (emphasis added)

With the possible exception of the unique category of a homicide committed by a person serving a life sentence, (see **Woodson v. North Carolina,** 96 S. Ct. 2983, footnote 7, and **Roberts v. Louisiana,** 96 S. Ct. 3006, 3007, footnote 9) it appears almost certain that any form of mandatory death penalty, regardless of its narrow scope or limited application to specific types or categories of crimes is unconstitutional.

This leads to the inescapable conclusion that section 94-5-304 R.C.M. 1947, providing for a mandatory sentence of death for aggravated kidnaping where the victim is dead as a result, is patently unconstitutional. The statute provides:

> "94-5-304. Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct."

Unfortunately, the 1974 amendment, which deleted the words "unless there are mitigating circumstances" which appeared in the former section 94-5-304, has the effect of rendering it unconstitutional under the recent Supreme Court cases. (see: **Woodson** and **Roberts,** supra).

A similar situation exists in regard to subsection (2) of section 94-5-105 R.C.M. (1947) which was added by amendment to that section in 1974. That subsection creates a mandatory death penalty in the case of a deliberate homicide in which the victim is a peace officer killed while performing his duty. The amendment removed this category of deliberate homicide from the list of categories under subsection (1) of section 94-5-105 for which the death penalty is required "unless there are

mitigating circumstances", and made the death penalty absolutely mandatory for killing a peace officer. The subsection provides:

> "94-5-105. Sentence of death for deliberate homicide.
> (2) Notwithstanding the provisions of subsection (1) and **regardless of circumstances,** when a defendant is convicted of the offense of deliberate homicide under subsection (1) (a) of section 94-5-102 in which the victim was a peace officer killed while performing his duty the court **shall impose** a sentence of death." (emphasis added).

Therefore, due to the unqualified mandatory character of sections 94-5-105 (2) and 94-5-304 and their resulting failure to provide the constitutionally indispensible requirement that the character and record of the individual offender and the circumstances of the particular offense be considered in determining whether or not to impose the death penalty, these statutes can only be regarded as unconstitutional and are in need of revision if the death penalty is to be effectively imposed for these crimes.

The proposed legislation cures the constitutional defect of these sections by adopting a single procedural system for imposition of the death penalty in all cases. It totally rejects the imposition of mandatory death sentences and adopts a constitutionally approved procedure consisting of a separate sentencing hearing in which both aggravating and mitigating circumstances relating to the offender and the offense are considered, and a procedure for automatic review of all death sentences in accordance with specific statutory guidelines. (See: **Gregg v. Georgia, Jurek v. Texas,** and **Proffit v. Florida,** supra).

APPENDIX D

REPRINTED ARTICLE FROM THE GREAT FALLS TRIBUNE, OCTOBER 3, 1976, REGARDING FIXED SENTENCING.

TREND IN PENOLOGY GROWS TOWARD FIXED SENTENCE

By JOSEPH R. TYBOR
Associated Press Writer

Indeterminate prison sentences, the kind that get a person five years to life for a criminal conviction, may be losing ground to a new trend in penology: the fixed sentence.

Parole, another major penal practice, would disappear, too, if fixed sentencing spreads in popularity, as it seems to be doing among those penologists who are losing faith in the ability of the prison system to reform criminals.

Maine is the first state to switch from indeterminate to fixed or "flat-time" sentences, the practice of sentencing a criminal to a specific number of years for his crime.

Maine's law became effective last May, but fewer than 100 persons have been sent to prison so far under the new procedure. One was a man convicted of manslaughter who was sentenced to 10 years in jail, less time off for good behavior. Under the old system, his sentence would have covered a span of years, say one to 10, with the possibility of parole after a few months in jail. Now there is no parole.

Indiana also has a fixed-sentence law, effective next July. And California is about to get one. It, too, will be effective next July. The California Legislature approved the bill last month. It needs only the signature of Gov. Edmund G. Brown, Jr., who has endorsed the legislation.

Fixed-sentence bills now are before the legislatures of six states: Alaska, Illinois, Connecticut, Colorado, Washington and Ohio. In Virginia, Florida and South Dakota, legislative commissions are studying proposals for fixed prison terms.

The Minnesota Legislature approved a flat-time sentence bill, but it was vetoed by Gov. Wendell Anderson, who said some of the sentences were too lenient. A new bill is to be introduced in January.

On the national level, President Ford has directed the Justice Department to study fixed sentencing procedures for federal courts. And the Twentieth Century Fund's Task Force on Criminal Sentencing produced a report this year that says the present system of sentencing in American courts is "perhaps the major flaw in the criminal justice system."

The Fund recommended a system of "presumptive sentencing." Its report explained: "The underlying presumption here is that a finding of guilty of committing a crime would predictably incur a particular (fixed) sentence unless specific mitigating or aggravating factors are established."

In the various debates, few have criticized the principle of fixed sentencing. Most of the opposition has been based on the length of sentences in specific bills, either too severe or too lenient.

In California, for instance, the American Civil Liberties Union and a prisoners' union opposed the California bill with arguments that the sentences were too severe. In Illinois, on the other hand, the National Prisoners Association and the National Prison Project of the ACLU supported a flat-time plan.

The Indiana law was under study for three years by a special commission.

"We felt we strongly needed a new criminal code," said James Smith, administrative aide to the governor, "and philosophically we believed in determinate sentencing. The parole system as practiced now is a farce and just doesn't work.

"The thrust that we used was that it provided the prosecutors and the judiciary with an up-to-date tool in the administration of the criminal justice system . . . We felt strongly that it would help reduce crime. The actual concept of determinate sentencing was never a roadblock in the bili's passage; the debate was over the length of sentences."

In Maine, the sentences laid out in the new law mean longer periods in jail for some crimes and a rising prison population.

A person convicted of armed robbery or rape, for example, must go to jail for at least 10 years, and actually serve at least 6.01 years with time off

for good behavior. Under the old law, a judge was free to impose any sentence he wished for these two crimes. The median sentence for armed robbery in recent years was five years, and average time actually served before parole, 3.3 years. The median sentence for rape was seven years and average time served 4.6 years.

Chase Whittenberg, placement associate with the Maine Department of Mental Health and Corrections, expects the average prison population to rise more than 30 per cent.

"We don't know, quite frankly, what we're going to do for money," she said. "We're just beginning to feel the increase now."

Ironically, flat-time sentencing was common practice until the turn of the century. But by the 1920's, penal reform had made the indeterminate sentence and the system of parole widespread in the United States. Indeterminate sentences were considered a tool of rehabilitation because criminals could be released on parole when they were considered fit for society.

Today, with the nation's crime rate continually rising, minds are changing. Rehabilitation no longer seems as important or as possible to many penologists.

" . . . Just let the punishment fit the crime," says David Fogel, executive director of the Illinois Law Enforcement Commission. His book, "We Are the Living Proof," has made him a leading advocate of fixed sentences.

Few other nations permit as much flexibility as the United States in their methods of criminal punishment. For example, a murderer sentenced in this country to up to 250 years may serve only 10.

Richard Speck, who murdered eight nurses in Chicago in 1966, was sentenced originally to the electric chair. This was changed to eight consecutive terms of 50 to 150 years, a total of at least 400 years. Nevertheless, under Illinois law, Speck became eligible last month for a parole hearing.

"Indeterminate sentencing has simply lost its credibility," said Sanford Fox of the Boston College of Law, who helped draft the Maine law.

That law, part of an overhaul of the state's entire criminal code, not only abolishes parole but makes prison rehabilitation programs voluntary.

It provides for mandatory life sentences for six kinds of premeditated murder and at least 20 years for other cases of premeditated murder. Those serving life sentences must remain in jail at least 30 years before they are eligible for release for good behavior, and those serving any sentence of more than 20 years must remain in jail at least 20 years.

There is still some discretion left to judges in selecting a jail term between the minimum and maximum sentences for a crime, notes Fox, "but in comparison with the parole system, you have a much more viable and visible decision."

Tim Fitzharris of the California Probation and Parole Association sees his state's bill as a setback in criminal justice. He argues that it will mean punishment that is too lenient for some and too severe for others and will weaken the state's control over released prisoners who revert to crime.

Under the California law awaiting Brown's signature, a first conviction for robbery carries a sentence of two, three or four years, less time off for good behavior — usually a maximum of one year. Under current law, the same conviction carries a sentence of five years to life, with 33 months the average time actually served before parole.

Once a convicted robber is released Fitzharris says, the state can have control over him for one year under the new law — sort of parole. Under the present system, the parole board can send a person back to jail for parole violation.

The 20th Century Fund's report recommends that parole authorities be stripped of their present wide powers to release prisoners or keep them in jail. Instead, it recommends that parole board systems concentrate on preparing prisoners to adjust to a new life and help them find jobs after they are released.

The fund also issued a list of suggested sentences for major categories of crimes. Its report said that more persons would be sent to prison, but that the credibility of the justice system would be enhanced and the average prison sentence would probably be shorter than it is now.

APPENDIX E

SENTENCING: ALTERNATIVES TO MONTANA'S CODE OF CRIMINAL PROCEDURE.

SENTENCING: ALTERNATIVES TO MONTANA'S CODE OF CRIMINAL PROCEDURE

Prepared By
Donald W. Molloy, Esq.

August 13, 1976

"Perhaps no single process or series of process in the criminal justice system is more chaotic than the act of sentencing. Even to the layman, it is apparent that the consequences of sentencing are enormous. Significant problems and a continuing dilemma surround the craft of sentencing. That the punishment should fit the crime (and, more recently, the criminal as well) is a long held axiom. The application of the axiom is at best difficult in any system of general criminal laws dealing with specific criminal offenses and offenders is obvious to all who have observed our criminal justice system."[1]

INTRODUCTION

During fuedal times the question of what sentence was to be imposed on a convicted defendant was of little consequence for courts. In that period the sole function of the judiciary was to determine the question of guilt and to enter judgment. Sentencing was uncomplicated. The difficulty for the crown's sentencing authority was in determining the variation by which the guilty defendant was to be executed.[2]

The passage of time and the enlightenment of mind in the centuries up to and through the middle of the twentieth century indicate at least two tautological distinctions exist between fuedal and modern sentencing. Philosophically sentencing is ostensibly more humanistic, and, ultimately, sentencing is certainly more complex. Sociological theory and statutory complexity have made criminal sentencing in Montana, as elsewhere, a little understood and greatly inefficient aspect of the criminal justice system.

This paper is a project undertaken at the direction of the Montana Crime Control Board and Director Brinton Markle. It is a statement of sentencing as it presently exists in Montana and a suggestion of possible alternatives to the present sentencing structure.

I. APPROACHES TO SENTENCING

The approaches to criminal sentencing, as well as sentences imposed, are many and diverse. Consistancy is often found only on the most general levels: Sentences meted out for the same offense; sentences by the same judge; sentences in a given geographical location; or, some other nebulous characteristic. Often persons participating in the same crime are given different sentences for identical acts arising out of the same circumstances, all of which lead to unmistaken uncertainty — but done in the context of making the sentence fit the criminal. Uncertainty on the part of those legislating sentencing statutes, uncertainty on the part of judges sentencing, and uncertainty on the part of convicted defendants as to what is in store for them once incarcerated or placed on probation.

"The spectre of the uneven hand of the law, dispensing sentences willy nilly according to whim, caprice, or idiosyncracy, is not a metaphor drawn from **Dickens** or **Dostoevsky** but rather is an often characteristic description of correctional dispositions which may be observed in this country today."[3]

Several factors contribute to the uncertainty of criminal sentencing. To understand that uncertainty and to appreciate the consequences of new or old directives, it is first necessary to consider the conceptual basis of the criminal sanction. Otherwise, hit and miss legislation and interim change in sentencing is likely to be doomed to failure. A statement by the Research and Policy Committee of the Committee for Economic Development accurately prognosticates the fate of such legislation.

"[The] committee believes that important as they are, piecemeal efforts to reform the highly fragmented, patchwork structure of criminal justice will inevitably fail."[4]

The major conceptual approaches to criminal sentencing are three: (1) psychological; (2) sociological; and (3) emotional. Simply stated, the

psychological approach rests on the premise that crime stems from some anti-social displacement which is akin to an illness in the perpetrator of the criminal act. The theory suggests **treatment** of the **individual** to bring about acceptable social conduct.

The sociological theory on the other hand, adheres to the concept that the individual is a product of his social environment. By this notion corrective measures are directed at placing the individual in a positive social environment and the erradication of circumstances producing anti-social conduct.

Finally, the emotional theory of criminal conduct is the idea that most crime is the direct result of the inability and incapatability of the individual offender in dealing with certain aspects of his life. Frustration is ultimately relieved by the criminal act. The incapacitation of the offender is the pragmatic solution to this theory of criminal behavior.

A fourth approach to criminal sentencing deserves mention and that is the econometric theory of criminal behavior. Under this approach crime is seen as purely economic, existing only where the benefits of crime outweigh the costs. To reduce the frequency of crime, economists generally recommend that the costs of crime be raised. The cost is the threat of prison and the benefit is whatever psychic gain the criminal expects from his crime, combined with the monetary aspect of the act, if any.

A direct consequence of the theory of criminal behavior is the goal of criminal sanctions as implemented by statute. The United States Supreme Court recently identified "three legitimate functions of a correctional system: deterence, both specific and general; rehabilitation; and institutional security."[5] That Court also has "long recognized that '[F]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' **Pennsylvania v. Ashe,** 302 U.S. 51, 55 (1937)."[6] Judge D. P. Lay states that the Supreme Court has noted four purposes for imposing a sentence of imprisonment: (1) deterence of similar crimes; (2) protection of society, (3) discipline of the offender; and, (4) rehabilitation of the wrongdoer.[7]

A number of objectives for criminal sanctions exist. They include: (1) reformation and rehabilitation of the offender; (2) retribution and punishment of the defendant; (3) deterence of crime and prevention of recidivism; (4) incapacitation of the criminal and the protection of society; and (5) restitution or remuneration of victims. Obviously the objectives, reflected in various Montana statutes, are not mutually consistant.

Essentially the elements of sentencing can be reduced to four factors garnered from objective and subjective evidence about the crime and the criminal. Each sentence should reflect in some measure (A) the seriousness of the crime; (B) the circumstances of the crime; (C) the prior criminal history of the defendant, and (D) the behavior of the defendant after sentencing.

From this morass of theory, purpose, objective and element, a systematic skeleton for sentencing can be recognized. Every sentence must have some **functional basis.** The function of sentencing should be mandated legislatively. A determination of the individual's sentence should be based on the elements suggested in the immediately preceding paragraph. Finally, the sentence imposed should reflect consistancy between function and purpose. As it now stands, uncertainty is prevalent primarily because

> "As a society, we have made inconsistant demands on our official system of social control, expecting greater security from violence, disorder and depredation and simultaneously requiring that penal sanctions become less rigorous and more adapted to the individual offender."[8]

II. ANALYSIS

The analysis of any statutory scheme for sentencing takes on an essentially bifurcated nature. It is either a systemic analysis or a procedural analysis. The former deals with "why" a criminal is sentenced, the later with "how" a criminal is sentenced.

A. Systemic Analysis

Hans Mattick has said that "The genius of American penology lies in the fact that we have demonstrated that eighteenth and nineteenth-century methods can be forced to work in the middle of the twentieth century."[9] Rehabilitation, the conceptual justification of modern penology, is the paragon of platitudinous rhetoric. Egalitarian notions of justice and societal self-righteousness

have fostered a widely held legislative belief that criminals can be "rehabilitated", made socially functional by incarceration in underfunded antiquated penal institutions. The rhetoric of rehabilitation belies the practical realities of long-term confinement of extremely large numbers of inmates. Harvard Law Professor Allen Dershowitz states in an article published in the **New York Times** that:

> "Rehabilitation simply has not worked. A recent survey of more than 200 studies of rehabilitation came to the discouraging conclusion that we have 'very little reason' to believe recidivism can be reduced by any of the currently employed rehabilitative techniques."[10]

Penal rehabilitation programs are inhibited by a plethora of bureaucratic and custodial restraints. In fact "most institutional employment and training programs are not relevant to the future employment possibilities of prisoners . . . Much that passes for reform is a facade or serves strictly institutional needs."[11] Thus, "in the absence of credible scientific data on the causation or treatment of crime, the content of the correctional treatment of crime, the content of the correctional treatment program rests largely on speculation or on assumptions unrelated to criminality."[12]

Despite the growing consensus that rehabilitation, given present levels of funding and existing institutional conditions, is not working, many courts proceed in a direction consistant with the rhetoric of rehabilitation but out of tune with its reality.

> "While courts have thus far declined to elevate a positive rehabilitation program to the level of a constitutional right, it is clear that a penal system cannot be operated in such a manner that it impedes an inmates ability to attempt rehabilitation, or simply to avoid physical, mental or social deteriorations."[13]

To undertake a systemic revision of sentencing would require the abandonment of the rehabilitation notion and a concomitant conceptual change in the legislative approach to sentencing, or, the expenditure of much greater amounts of tax dollars to bring the practicalities of rehabilitation in line with the rhetoric of rehabilitation. Undoubtedly rehabilitation could be made to work, if only in the sense of behavior modification such as that articulated by B. F. Skinner. However, the cost of such a rehabilitation program would be astronomical. Furthermore, any attempt to re-educate the public, and legislators specifically, would seem premature at this point when there is no evidence that rehabilitation would not be possible in concentrated, adequately funded programs.

In summary, it appears that sentencing alternatives proposed from the perspective of concept alteration would inevitably be doomed to failure. The question of "why" an individual is sentenced is best left to resolution by philosophers and kept out of the context of legislation.

B. Procedural Analysis

How a convicted defendant is sentenced is an issue that can be dealt with and alternatives proposed despite theoretical inconsistencies in why an individual is sentenced. Procedural analysis and proposals simply accept a number of preestablished premises. It assumes a divergence of opinion in why a person is sentenced and the goals of sentencing. It also allows great latitude in tolerance of differing functional aspects of sentencing. Procedural analysis accepts the present statutory structural framework of sentencing in Montana but suggests meaningful alternatives can be established by manipulation of the system parts now employed.

1. Montana's Present Sentencing.

A major problem in Montana's sentencing is the misunderstanding of how sentencing works. Although Title 95 chapters 22 and 23 of the Revised Codes of Montana (1947) provide a focal point for criminal sentencing, in reality a thorough understanding of sentencing cannot be had unless the myriad of other titles and chapters concerning sentencing are considered.

Explicit in the Montana sentencing statutes is the rehabilitation theme. This is mentioned because it provides at the same time a measure of the legislature's intent in the present statutory framework and a standard against which the difficulty of sentencing can be set. It is essential that legislators, and the public as well, have an understanding of how sentencing actually works. It is unfortunate that the law of sentencing in Montana is so complex. It is probably safe to say that many judges and attorneys do not understand the ramnifications of a single defendant's sentence.

The Montana Constitution of 1972 provides the

backdrop for sentencing in Article II, § 28, "Rights of the Convicted" which provides in part:

> "Laws for the punishment of crime shall be founded on the principles of **prevention** and **reformation.**"

The emphasis of the constitutional provision apparently rests on the articulated goal of protecting society.

The statutory provisions for sentencing, however, are prefaced by § 95-2201, R.C.M. 1947 which appears to emphasize the rehabilitation of the individual criminal.

> "This chapter shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities; that **dangerous offenders** shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the individual."[14]

Regardless of which theory a judge is inclined to follow when an accused is convicted or pleads guilty to a crime, the judge has specified alternatives available in sentencing. He can:

1. Release the defendant on probation;
2. Defer imposition of the sentence for up to three (3) years; (this effectively means the convicted defendant is not sentenced);
3. Suspend the imposition of sentence (here the defendant is sentenced but does not have the sentence executed for the period of suspension so long as he abides by the conditions of the suspended sentence);
4. Impose a fine;
5. Commit the defendant to a correctional institution;
6. Impose a combination of any or all of the above alternatives.[15]

Of prime concern in this paper is the sentence alternative of incarceration for it is this alternative which is most visible to the public and purportedly deals with the worst kind of defendant. It is also this alternative which is subject to the most confusion because of a misunderstanding, a misconception, by most persons involved in the sentencing process once the individual defendant is incarcerated.

The confusion starts even before trial, at the time of indictment or information being filed. If the state, as it is allowed in certain cases, seeks **increased punishment** of an accused as a prior convicted felon (persistant felony offender) under § 95-1507, notice must be given the accused and his attorney. If the accused is convicted then the court alone holds an hearing to determine if the allegation of the prior felony conviction is true. If the allegation of the prior conviction is true the defendant is sentenced under the provisions of § 95-1507, R.C.M. 1947.[16]

Section 95-1507, R.C.M. provides that one convicted of a felony and proved to be a persistant felony offender under § 95-1506(2), R.C.M. 1947:

> "shall be imprisoned in the state prison for a term of not less than five (5) years nor more than one hundred (100) years . . ."

Thus, conviction of a felony and proof of a prior felony in accordance with § 95-1506, R.C.M. 1947 is the **ONLY** instance in Montana's sentencing statutes that a convicted defendant is subject to a **MINIMUM SENTENCE.** In all other instances the Judge in sentencing has the option of giving no sentence or giving any sentence up to a maximum period specified for each crime.[17]

The incorporation of no minimum sentence and an established maximum sentence in the Montana Criminal Code of 1973 appears to be less a consideration of establishing punishment according to the crime (although the idea is reflected to some extent in the variation of maximum sentences available for different crimes) and more a development following the logic of a seductive slogan of "let the punishment fit the criminal not the crime.[18] Furthermore, it contributes to the great disparity in sentences given different defendants who have committed similar crimes.

The sentencing to a minimum sentence as a persistant felony offender under § 95-1506, **supra,** is not without further statutory complication. Even though a defendant is not accused and subjected to increased punishment under sections 95-1506 and 95-1507, his incarceration may be extended under the provisions of 95-2206.5 which provide:

> "when an offender has been previously convicted of a felony and the present offense is a second felony committed on a different occasion than the first, the sentencing court **shall** designate the offender a persistant felony offender for purposes of eligibility for parole under section 95-3214 . . ."

Sentencing under this section, apparently mandatory as indicated by the legislative use of the word "shall," does not establish a minimum sentence. Rather, it increases the amount of time a prisoner must serve before reaching parole eligibility.

Before the effect of parole on sentencing can be considered it is first necessary to establish how a sentence can be 'shortened" once an inmate is incarcerated at the state prison.

The inmates at the Montana State Prison have a rule of thumb they use to determine their incarceration time. Most inmates believe they must serve but one-fifth (1/5) of the sentence imposed by the Judge before they can be returned to the streets. The rule of thumb is close to being mathematically accurate but has no statutory basis. What exists is a statute, § 80-1905, R.C.M. 1947, that permits anyone incarcerated in the state prison to earn a good time allowance which "shall operate as a credit on his sentence as imposed by the court, conditional upon the inmates good behavior and compliance with the rules and regulations made by the department or the warden."[19] Depending on an inmates classification in the institution, if he is working, he can earn good time at a base rate of 10, 13, or 15 days per month. This time can be further increased by participation in school programs, donation of blood, and participation in other self-improvement activities designated by the department of institutions.

The good time allowance is then considered in conjunction with the inmates original sentence to determine his parole eligibility date. A prisoner in the Montana State Prison is released on Parole when the parole board determines there is a reasonable probability that the prisoner can be released without detriment to himself or to the community. This time usually occurs when the inmate has served

> "one-quarter (1/4) of his full term, less good time allowances off, as provided in section 80-1905; except that no convict designated a persistent felony offender under section 95-2206.5 may be paroled until he has served at least one-third (1/3) of his full term less good time allowances off, as provided in section 80-1905."[20]

Ultimately the length of incarceration rests on the decision of the parole board and not the sentencing judge. However, it is reasonable to assert that the vast majority of first time incarcerations are released when their parole eligibility date arrives. There are some exceptions to the inmates rule of thumb that a sentence of incarcaration is approximately one-fifth (1/5) of the time given in the judgment.

The major exception is that for sentences of a specific term of years, in excess of fifty (50) years, parole eligibility occurs twelve and one-half (12½) years after the date of incarceration for the first time offender.[21] A persistant felony offender, as designated by § 95-2206.5, R.C.M. 1947, must serve seventeen and one-half (17½) years of a term for years before parole eligibility.[22]

The other exception to the rule of thumb is that a convict serving a life sentence must serve thirty (30) years less good time or about twenty-six (26) years until he is eligible for parole.

In effect, the legislative intent manifest in Montana's Criminal Code, Title 94, R.C.M. 1947, is inconsistant with the provisions for parole and institutional good time. It is virtually impossible for a judge to sentence a convicted person to the maximum sentence for a crime and reasonably expect the defendant to be incarcerated for that length of time. For example, if the circumstances surrounding the crime of sexual intercourse without consent, § 94-5-503 (rape) were such that the Judge, in light of the forty-year maximum sentence, wanted to incarcerate the defendant for a period in excess of ten (10) years he could probably not achieve the goal. Montana's statutory maximum sentences are subjected to severe restriction by the good time and parole statutes, both of which are inherent parts of the rehabilitation scheme. Practically maximum sentences are meaningless in Montana.

The final aspect of sentencing in Montana which must be discussed briefly, is sentence review, § 95-2501 st. seq., R.C.M. 1947. Under this plan, once an inmate is finally incarcerated and a legal sentence imposed, the convicted defendant may request a review of his sentence by a panel of three judges sitting as a division of the Montana Supreme Court. The jurisdiction of this court is limited by state to reviewing "legal" sentences imposed on convicted defendants.[23] The Sentence Review Division provides the intersticial remedy, previously non-existant, for a convicted felon who is given an unjust or inequitable sentence but lacks legal ground for direct appeal of his conviction.

> The legal function of . . . [the] division is to determine whether or not a particular sentence falls within a permissible range, considering the offense and the circumstances.[24]

The Division will not hear a case wherein there is pending a direct appeal to the Montana Supreme Court.

Even though most judges can't agree in what a proper sentence is, most agree that sentencing is one of the most difficult tasks facing any judge. "Generally judges consider sentencing to be the most difficult of their many duties,"[25] and the Montana Sentence Review Division has declared that "as with most criminal sentencing, it is an agonizing process for the judge . . .[26]

Though the task of sentencing is agonizing and difficult, if the results of the Montana Sentence Review Division cases accurately reflect the job being done by Montana Judges then Montana's judges are doing an excellent job of sentencing criminals. Nearly eighty-two (82%) per cent of the sentences considered by the Sentence Review Division were left unchanged while only eighteen (18%) per cent were changed.[27] Significantly of the eighteen (18%) of the sentences changed, all the changes were reductions of incarceration time but one in that case the sentence was increased. Nearly all the reductions of incarceration time did not involve an actual change in the sentence; the usual change was suspending some of the time originally imposed as incarceration time.

These figures may not support the premise that Montana judges are doing a good job of sentencing. They may reflect the reluctance of the sentence review division to increase sentences at an appellate level. Ultimately the Sentence Review Division does not reflect any semblence of its purported purpose of providing a basis of review to ensure some measure of equality of sentencing throughout the jurisdiction of Montana.

Few accurate generalizations exist about Montana sentencing. But, it is a process that lacks statewide consistency and is remiss in certainty. Thus, the predictability which should exist as far as Montana's criminal sanctions is absent. No one can predict what sentence a convicted defendant will get or, for that matter, what the sentence will mean once it is imposed. The prosecutor and judge cannot predict the sentence given will stand. And, the legislature cannot predict what action should be undertaken to rectify present deficiencies and disparities because there is no data base upon which to proceed. Predictability is necessary because a proper sentence as a statutory statement or as applied to the individual should reflect a prediction of the maximized protection for society, a just answer for the victim of crime and finally a prediction of the proper sentence for the individual convicted defendant.

III. SENTENCING ALTERNATIVES

What follows is a numerical list of alternatives to sentencing in Montana, by no means exhaustive but drawn from the perspective of procedural analysis. Many of the alternatives exist in one form or another in other jurisdictions, some are novel. A few will be discussed briefly after the alternative is listed.

1. Sentencing by a panel of judges instead of sentencing by a single judge as is now done.
2. Sentencing by the jury.
3. Place the Montana Sentence Review Division in the sentencing scheme as the sentencing authority.

This could easily be accomplished by minor statutory revision. Under such a plan, every person convicted in Montana would be sentenced to Deer Lodge indefinitely. Each person so sentenced would then have a complete pre-sentence work-up done by the professional social service personnel at the prison. On completion the panel would impose the sentence deemed **appropriate for the crime** — given the individual who committed it. (Emphasis would differ from the present system where the individual is sentenced while **punishment** is secondary). Under such a scheme the panel would have the same alternatives in sentencing available to it that are presently available to district court judges imposing a sentence.

4. Impose an indefinite sentence to the state prison with the release date to be determined by a panel of professional penologists and sociologists.

This has been done in Washington and California as well as in several other states. It has not met with much success in terms of rehabilitation.

Under the Washington plan the judge makes the initial decision of probation or prison. If the judge decides on a prison term he must sentence

the defendant to the maximum sentence allowed by law .The minimum sentence is then fixed by the "Board of Prison Terms and Paroles", within six (6) months of the offender's admission to the department of institutions.

The department of institutions staff then prepares an admissions summary on the offender's background which includes:

a. information on the individual's criminal pattern;
b. analysis of factors contributing to the offense;
c. the defendant's personal history
   (i) family
   (ii) marital relationship
   (iii) school
   (iv) work history
   (v) medical psychological reports
   (vi) reports and evaluations of department professional staff personnel.

Prior to the board meeting, reports from the judge and prosecuting attorney concerning the facts of the crime and recommendations of the length of the sentence are received by the board. The board then interviews the prisoner, makes a decision of the sentence to be imposed and then notifies the defendant and states why the sentence is imposed. The inmate is then periodically re-interviewed for evaluation each year. The board has the power to increase or decrease the minimum sentence while the inmate is incarcerated. **See,** § 9.95.001 et seq. R.C.W. and Cal. Penal Code § 5075 et seq.

Although this concept is theoretically appealing it has been extensively criticized. On the positive side, indeterminate sentencing removes the decision as to the length of the sentence from the trial judge and places it in the hands of a qualified panel of behavioral experts who base their decision on more evidence than is available at the post-conviction stage of trial. It is flexible, therapeutic, and based on an on-going evaluation.

Some criticisms of the indeterminate sentence are that it assumes the offender may be successfully diagnosed, treated and cured. The validity of this premise is subject to doubt. Further, disparities in the competency and approach among institutional, professional staff members cause inequality and unfairness in the treatment of inmates. Some suggest that the indeterminate sentence can become a means of vindictive control or discrimination for institution administrators. Finally, the high maximum sentences create and foster uncertainty and create a counter-rehabilitative effect on inmates.

> "The prisoner's union, a national organization controlled and staffed by ex-convicts, has made 'the abolishment of the indeterminate sentence and all its ramnifications' its primary object. Its spokesman . . . argues that 'criminals should be punished' rather than treated and they should be punished equally without regard to their backgrounds or individual needs."[28]

Sentencing by an administrative board can easily become arbitrary and unmanageable. Its success depends on the development of costly, extensive diagnostic and correctional facilities which Montana's legislature and executive may be unwilling to make.

5. Eliminate Parole from the present system of criminal sentencing with a concomitant reduction in the maximum sentences permissible for a given crime.

6. Eliminate "good time" from the present sentencing structure with a reduction in some maximum sentences. This involves the recognition of the use of good time as a means of institutional behavior control and the effectuation of some new mechanism to control inmate behavior.

7. Institute a lay sentencing panel. This scheme would be akin to having two juries, one to determine guilt, the other to impose punishment. This panel of lay sentencers could function in much the same fashion as the federal grand jury panel does. It would be empaneled for a specified period of time such as a year or two years, and during that time would collectively sentence every individual found guilty of a violation of the criminal statutes.

8. Impose "flat-time" sentences. Under this plan the legislature would define one single sentence for each crime; that sentence would be served in full with the only possible reduction being for "good time" or by executive commutation in an extraordinary case. This alternative may be subject to constitutional criticism.[29]

9. Mandatory minimum sentencing. This pro-

posal is the half-brother of flat-time sentencing. It simply eliminates all discretion by the judge to go below a certain minimum sentence that might be served for a given crime, regardless of the circumstances.

10. Sentence to a specific institution in Montana. Under this scheme the judge would take into account the purposes of sentencing, the needs of the community and of the individual defendant, and then sentence him to one of the followning:
    a. maximum security — Deer Lodge old prison;
    b. maximum security — Deer Lodge new prison;
    c. Swan River Youth Camp;
    d. State schools;
    e. County jails;
    f. community treatment centers
    g. out of state prisons;
    h. family custody.

A major change under a plan such as this is to take discretion from the Warden of the State Prison and give it to the sentencing authority with regard to where the individual is to be incarcerated.

11. Lower the present maximum sentences and impose statutory minimum sentences. This would, in effect be a reverting to the sentencing structure prior to the adoption of the new Montana Criminal Code.

12. Presumptive Sentencing. Presumptive sentencing is a novel approach to criminal sentencing. However, the concept is presently employed on a limited scale in Montana.[30]

Presumptive sentencing is conceptually quite simple. It maintains a proper balance between the legislative interest in sentencing and the judicial role in sentencing and the sentencing process. Under this plan the legislature decides by legislation what the maximum and minimum sentences for a given crime shall be. The legislature also establishes a presumption of what the sentence for a given crime should be for the typical first offender. The focus is on the typical offender not on the atypically horrible or the atypically sympathetic crime and circumstance. Additionally the legislature decides by what increment the presumptive sentence shall be increased for each prior felony conviction.

The trial judge who imposes the sentence has the power to increase or decrease the presumptive sentence based on legislatively established mitigating or aggravating factors. The trial judge can exercise this power to the extent of increasing the sentence to the maximum sentence or decreasing the sentence to the minimum sentence. But, in order to overcome the legislative presumption the judge so acting must justify in writing his departure from the presumptive sentence. On appeal there is a presumption against the departure from the legislative presumption of what the stypical sentence should be. Under this design the function of parole is shifted from institutional behavior control to an emphasis on social re-integration.

A leading Montana case in the interpretation of presumptive sentencing is **State v. Simtob.**[32] The court found sentencing under the Montana Dangerous Drug Act to be unique in that "the legislature has established a disputable statutory presumption in regard to sentencing [and] being disputable, it requires evidence to overcome section 93-1301-7, R.C.M. 1947."[32] The court held that under such a plan in Montana before the judge could exercise any discretion in sentencing, evidence must be presented which overcomes the legislative presumption.

Before ending the discussion of this alternative a **caveat** is in order. The judges in this state may not be receptive to such a plan if the special concurrence of the Chief Justice in **Simtob** reflects the attitude of many trial judges.

> "However, I do most seriously question the wisdom of the legislature in establishing a statutory presumption for those 21 and under who are guilty of possession or sale of dangerous drugs, as discussed in the opinion. Whether or not one is entitled to a deferred imposition of sentence I feel is better left to the sound discretion of the judge and he should not be held accountable for the exercise of his discretion. The broad provisions with reference to liberal constructions, presentence investigations, sentence and judgment contained in Chapter 22 of title 95, Montana Code of Criminal Procedure, are amply sufficient to take care of any and all problems that may arise. **I see no reason for the legislature to attempt to constrict the powers of the judge granted therein.** (Emphasis added.)

IV. CONCLUSION

> "In devising any sentencing policy it first must be noted that sentencing is not a neutral act; it is a human process occurring within a social environment of laws, facts, ideas and people. A sentencing procedure's validity depends upon the extent to which each of these factors is taken into consideration."[33]

Sentencing in Montana is a hodgepodge of over a century's legislation — enacted bit by bit, year on year. Sentencing is disfunctional because of the discretion involved in the process at every level from the arresting officer to the parole board. Any meaningful change must reflect the realities of rehabilitation as a conceptual basis for criminal sentencing and a simultaneous recognition of punishment as a legitimate social function.

> "What is proclaimed as panacea by one generation of reformers is denounced as anathema by the next. but the call for reform continues unabated, fueled by our collective frustrations over rising crime rates and staggering disparities in the sentence imposed under our present system."[34]

If there is to be meaningful change in Montana's criminal sentencing, the legislature must end the practice of passing laws as symbolic gestures with no intention that they be enforced. The legislature must come to grips with the problem and avoid passing purposely vague laws with the intention that something other than full enforcement be accomplished. Lastly, it would help in the identification of problems with present sentencing if those dealing with it, judges, lawyers, and legislators, had a thorough understanding of the ramnifications of the sentencing process.

FOOTNOTES

1. Compendium of Model Correctional Legislation and Standards (ABA & Council of State Governments, 1972).
2. B. George, "An Unusual Problem: Comparative Sentencing Techniques", 45 A.B.A.J. 250 (Mar. 1959).
3. Note, "The Collective Sentencing Decision In Judicial and Administrative Contexts: A comparative Analysis of Two Approaches to Correctional Disparity", 11 Am. Crim. L. Rev. 695 (1973).
4. "Reducing Crime and Assuring Justice" June 1972: A Statement on National Policy by the Research and Policy Committee of the Committee for Economic Development.
5. James v. Wallace, 406 F. Supp 318, 328 (M.D. Ala. 1976).
6. Gregg v. Georgia, ———U.S.———, 44 U.S.L.W. 5230, 5240 (July 2, 1976).
7. Judge D.P. Lay, "A Judicial Mandate", Trial (Nov./Dec. 1971).
8. D. A. Thomas, "Developments in Sentencing" Crim. L. Rev. 682 (Dec. 1974).
9. Morris & Hawkins, **The Honest Politician's Guide to Crime Control** (1969).
10. A. Dershowitz, "Let the Punishment Fit the Crime", The N.Y. Times Magazine (Dec. 28, 1975).
11. E. Morgenroth et. al, **Struggle For Justice**, 33 (Hall & Wang Inc. 1971)
12. **Id.** at 43.
13. **Supra** note 5 at 330.
14. § 95-2201, R.C.M. 1947.
15. § 95-2206, R.C.M. 1947 (1875 Supp.).
16. § 95-1506, R.C.M. 1947.
17. See generally, Title 94 R.C.M. 1947 and Title 53-133 et seq. for specific offenses.
18. **Supra** note 11 at 27.
19. § 80-1905, R.C.M. 1947.
20. § 95-3214 (1) (a), R.C.M. 1947.
21. § 95-3214 (1) (a), R.C.M. 1947.
22. § 95-3214 (1) (a), R.C.M. 1947.
23. State v. Simtob, 154 Mont. 286, 462 P.2d 873 (1969).
24. State v. Bliss 155 Mont. 4 (Sent. Rev. Div. 1970).
25. Judicature 59: No. 3 (Oct. 1975), 112, 114, C. Korbakes "Criminal Sentencing: Is the Judge's Sound Discretion Subject to Review?"
26. State v. Bliss, **supra** note 24.
27. The figures come from an unpublished study of every reported Sentence Review Case since the inception of the Division.
28. A. Dershowitz, **supra** note 10 at 20.
29. See, Gregg v. Ga. supra note 6 at 5232.
30. § 53-133, R.C.M. 1947(d), "A person of the age of twenty-one (21) years or under, convicted of a first violation under this section shall be presumed to be entitled to a deferred imposition of sentence. Jurisdiction under this section shall be exclusively in the district court."
31. State v. Simtob, supra note 23.
32. **Id.** at 88.
33. Comment, "Creative Punishment: A study of Effective Sentencing Alternatives", 14 Washburn L.J. 57 (1975).
34. **Supra** note 10 at 7.

ADDENDUM "A"

SENTENCING ANALYSIS CHECK LIST

I. WHO SENTENCES?
- A. Judge
- B. Jury
- C. Panel of Judges
- D. Lay Sentencing Panel (not jury)
- E. Professional sentencing board (i.e. psychologist, criminologist, sociologist, etc.).

II. WHAT KIND OF SENTENCE CAN BE GIVEN?
- A. Deferred imposition of sentence
- B. Suspended sentence
- C. Mandatory sentence for fixed term
- D. No fixed sentence, i.e. zero to X years per crime. (Individual sentences based on crime and circumstances basically the indeterminate sentence).
- E. Deferred Prosecution (not really a sentence)
- F. Maiming*
- G. Death Penalty
- H. Restitution
- I. Corporal punishment
- J. Public scorn*
- K. Banishment*
- L. Deprivation of civil rights
- M. Hard labor
- N. Fines
- O. Periodic sentence
- P. Work release
- Q. Diversion from prosecution or sentencing.

*(Not all the alternatives presented here are intended to be suggestions for realistic alternatives; they assist in drawing lines of propriety.)

III. WHAT KIND OF INCARCERATION IS AVAILABLE?
- A. Maximum security, no privileges
- B. Maximum security, privileges as earned
- C. Maximum security, privileges revoked based on behavior
- D. Swan River Youth Camp
- E. State schools
- F. County Jails
- G. Community Treatment centers
- I. Out of state prisons or other institutions

IV. HOW IS THE LENGTH OF SENTENCE DETERMINED?
- A. Fixed mandatory sentence, no parole
- B. Minimum sentences, parole
- C. Indeterminate sentences, parole
- D. Indeterminate sentences, no parole
- E. Fixed sentence, probation
- F. Mandatory sentence, parole
- G. Presumptive sentencing
- H. Sentence reduced by good time
- I. Sentence reduced by executive commutation
- J. Sentence fixed, no good time

V. WHAT IS THE SOURCE OF REVIEW OF THE SENTENCE?
- A. None
- B. Direct appeal, supreme court
- C. Direct appeal, intermediate court
- D. Sentence Review Division
- E. Indeterminate sentence, professional parole board review
- F. Panel of laymen
- G. Review by professional board
- H. Panel of district judges

VI. WHAT IS THE PURPOSE OF SENTENCING?
- A. Reformation — rehabilitation
- B. Retribution — punishment
- C. Deterence — prevention of recidivism
- D. Incapacitate criminal — protect society
- E. Restitution

VII. WHAT IS THE APPROACH TO SENTENCING?
- A. Psychological
- B. Sociological
- C. Emotional
- D. Econometric

VIII. WHAT ARE THE ELEMENTS OF SENTENCING?
- A. Seriousness of the crime
- B. Circumstances of the crime
- C. Prior criminal history of the defendant
- D. Behavior of the defendant after sentencing
- E. Individual characteristics of the defendant
- F. Factors in mitigation of the crime
- G. Factors in aggravation of the crime.

ADDENDUM B

STATE CODE §	WHO SENTENCES	SENTENCES	SENTENCE REVIEW
Alabama, 42 325	Judge, exception Jury (fines)	Fine, Hard labor	Death Sentence, also writ of error
Alaska, 12.55	Court	Suspended, modified minimum sentence.	Supreme Court on grounds of excessive sentence
Arkansas, 43-2301	Court and Jury (felony)	Fines, Min. & max. sentence, parole Bd determines after expiration of min; postpone sentence; suspended sentence.	Parole Board
Arizona 13-1641	Court gives min. & max.	Indeterminate; suspended	Sentence Review (13-1717)
Cal. Penal Code 1203	Trial Court	Indeterminate Sentence	Parol Board
Colo. 16-11-101	Trial Court; Separate hearing for certain class offenses.	Classification of offenses leads to sentence; time sent. no min. for certain class offenses, only max.; some indeterm.	Appeal from conviction.
Conn. 53a-35	Court sets max. & min.	Indeterminate; max and min.	Sentencing Judge: formerly S/R division (Montana statutes on sentence review were patterned after Conn.'s)
Deleware, 4332	Court	Fine, Imprisonment	Sentencing Judge, within 90 days of sentence.
D.C., 24-203	Judge on recommendation of probation officer	Sentence for max & min. (not less than ⅓ max) after min, release by parole bd.	Parole Bd. may ask sentencing judge to reconsider min.
Fla. 921-141, 921-181	Bifurcated Trial for cap. felony; jury recommends	Indeterminate on non-capital felony; 6 mos. to max, p.bd. determines amn't of time in prison incarceration, min & max.	Automatic review of death penalty w/in 60 days; other cases appeal to S. Ct. on ground sentence is illegal.
Ga. 27-2502	Jury w/in min & max. prescribed by statute; Judge may suspend; Plea of guilty judge sentences		Only of Sentence imposed by Judge; death penalty reviewed by S. Ct.
Hawaii, 711-76	Court sets max, Bd. of Pd. set mini. w/in 6 mos.	Incarceration	
Idaho, 19-2513	Court sets max	Indeterminant, min. period of sentence established; suspended; probation; deferred.	Appeal from final conviction.
Indiana, 35-8-1	Court; Jury States amount of fine and punishment imposed	Fine, Imprisonment; special for age 21-30, max and min; over 30 indeterm.	Appeal as of rt.
Illinois, 1005-3-3	Judge, sets max & min.	Pre-sentence committment (60 days) classification of offenses w/in felony misdemeanor; periodic imprisonment (§ 1005-7-1)	None
Iowa, 789.13	Judge sets max. & min.	Indeterm sent; deferred judgement & suspended sent.; RESTITUTION.	Parole Bd. in the ultimate fixing of the sentence; S. Ct. review of severity.
Kansas, 21-4603	Judge sets min.	Indeterminate, no max. release determ. by P. Bd.	Court modify sentence w/in 20 days; any illegal sentence.

STATE CODE §	WHO SENTENCES	SENTENCES	SENTENCE REVIEW
Kentucky, 11.02	Jury fix degree of offense and penalty	Fixed sentences	For mistakes or on new evidence; post conviction review.
Louisiana, 571.3	Judge	Community Rehab.; Fixed Sentence P. Bd.	
Maine, 47-1152	Court	Suspended; unconditional dis-chg.; fixed period of sentence greater than one year tenative; split sentencing.	Dept. may request resentencing.
Mass. 279 § 24	Court sets max & min.	Indeterminate, Min. not less than 2½ yrs.	Sentence Review.
Maryland, 27 § 643	Judge	Extended work release; family leave; statutory max & min.	Sentence Review if sentence greater than 2 years.
Mich. 28.1072	Judge	Indeterminate for first off. Crt. fixes min term;; min not to be in excess of 2/3 max.	Excessive judgement
Minn. 609.10	Court	Court sets max or indeterm. sent. some min. sent. for certain offenses; mandatory min. for prior convicted felon.	
Mo. 546.410	Jury, Crt may reduce	Conventional type sentences, fixed max.	De Novo Review by S.Ct. in certain cases.
Mont. 95-2201	Judge	Max set by law no min; except prior felony conviction & in-creased punish.	Sentence Review.
Neb., 29-2204	Court	Prison and proba. Crt. may specify solitary conf.	No Review.
N. Mex. 40A-29-3	Judge	St. min. & max, indeterm sent case law requires judge to set max and min; court has power to commit for 60 eval.	Supreme Ct. review of excessive severity.
N.J., 2A:164-1	Judge	Pre-sentence commit. None for eval at inst. or local clinic; Indeterm sent. 1 yr. min.	None.
N.H., 651:2	Judge	Indeterminate sentencing Min can't exceed ½ max. conditional discharge available.	Sentence Review Division.
Nevada, 176.025	Judge	Definite sentence to fixed period; stat. max only.	None
N.Y., 380.20	Judge	Classification of offenses, A-E type felonies; Indeterminate sentencing, max & min det. under legislative guidlines.	
N. Car., 15-197.1	Judge	Max. & min. fixed by law; determination and indeterminate sentences; sentence splitting.	No sentence review.
N. Dak.	Judge	Standard Alternatives.	Sentence Court may reduce or correct w/in 120 days of imposition.
Ore. 137-120	Judge	Indeterminate; crt. sets max only, Crt. has power to discharge w/out sent.; special procedure for dangerous offenders.	None.

STATE CODE §	WHO SENTENCES	SENTENCES	SENTENCE REVIEW
Okla.	Judge	Fixed max., determinate sent.; std. alternatives (lacks any good guidlines for sentencing in statutory scheme).	None.
Ohio, 2929.03	Judge	Unique death penalty statute; Indeterminate sentencing, St. max. min. fixed by judge. std. alternatives.	On motion of def. or crt. w/in 60 days of committment remainder of sent. may be suspended after 30 days have been served, remainder then is on probation.
Pa. 1057	Judge	Indeterminate sent. Judge sets max and min not to exceed ½ max.; Accelerated Rehabilitational Disposition (i.e. deferred prosecution)	None.
R.I., 12-19-1	Judge	Determinate sent.; std. altern.	None.
S. Car., 17-553	Judge	Determinate w/in stat. min. & max.; max req'd. for 3rd offender; sentence may be increased on new evidence after imposed at any time; no probation or susp. sent.	None.
S. Dak. 23-48.15	Judge	Discretionary determ or indet., if indet. judge sets min and max. no deferred or suspended sent. allowed by stat.	None.
Tenn. 40-2703	Jury	Indeterminate, min & max fixed by jury, RESTITUTION.	None.
Texas, 12.01	Jury	Std. alternatives, indeterminate sentencing by jury.	None (legislature for sentence review recently rejected)
Utah, 77-35-20	Court	Fixed sentence, min and max set by law; sentence info. and term given to P. Bd. w/in 30 days of sentencing.	None.
Vt. 32a (v. R. Cr. P)	Court	Court fixes term of imprisonment unless otherwise fixed by statute.	None.
Va. 19.1-292	Jury	Commitment for 4 yrs. allowed in lieu of any other penalty, involves indeterminate sent.; allows 60 days diagnostic comitment before sentencing.	None.
Wash. 9.95.010	Court	Crt. fixes max. (see discussion in text pg. 15).	W/in six (6) Mos. after confinement Br. fixes sentence; Bd. may redetermine and refix min term.
W. Va., 61-11-16	Judge	General Sent., Judge may designate definite term which will be considered by P. Br.	None.
Wis. 973.01	Court	Indeterminate, crt. may fix term less than max., all sentences to state prison for 1 yr. or more.	Felonies may be appealed w/in 90 days.
Wyo. 7-313	Court.	Indeterminate sent., crt. sets max and min.; P. Bd. determines min for release.	None,(7.408.1 allows proceeding when there is a substantial denial of rts.).

APPENDIX F

PLEA NEGOTIATION

Courts Task Force Standard # 3.1 — CONSIDERATION OF PLEA

PURPOSES & REASONS FOR LEGISLATION:

1. Plea bargaining is an ineradicable fact, and failure to recognize it tends not to destroy it but to drive it underground.

2. Plea bargaining should be spread on the record to prevent abuse of plea discussions and agreements, and to provide appropriate and adequate safeguards.

3. The past and current ritual of denial that any promises have been made results in the lack of effective judicial review of the propriety of, and adherence to, plea agreements, thus increasing the risk of real or apparent unfairness.

4. Purpose of the proposed act is to formalize and establish a definite procedure for the conduct and use of plea negotiations and agreements by providing appropriate and adequate safeguards intended to prevent the abuse of such negotiations and agreements and to promote and further the interests of the defendant and the public in insuring that justice is done.

CASE & STATUTORY REFERENCES:
FEDERAL CASES:

Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L.Ed. 2nd 747 (1970)

Case contains language supporting the constitutionality of plea bargaining

At 397 U.S. 752-753 the Court said:

"Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system that produces them. But we cannot hold that is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than other wise might be necessary."

Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L Ed 2nd 427 (1971)

Facts: Defendant coped to a losser plea **in state court** under a plea agreement which also provided the prosecutor would not make any recommendation as to sentence. Different prosecutors handled sentencing and recommended the maximum sentence due to defendants past record. Court gave D, the maximum sentence.

Held: Reversed and remanded the case to state court to either grant the D **specific performance** of the plea agreement, or grant him the right to withdraw his guilty plea.

Court recognized the necessity of plea bargaining at 404 U.S. 257,260:

"The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining", is an essential component of the administration of justice. Properly administered, it is to be encouraged."

Although the case does not say so in exact words, the reasoning of the opinion appears to be this; We recognize and approve the process of plea bargaining and, due to its operation as an inducement for the entry of the plea and the resulting effect this has on the voluntary nature of the plea, such promises or agreements must be fulfilled in order that the guilty plea remain voluntary and valid.

OTHER STATE CASES:

Calif — **People v. West,** 3 Cal 3d 595, 477 P2d 409 — Illustrates current trend by more progressive courts towards recognizing or bringing plea bargaining out of the closet.

"Justification for concealment of plea bargaining has disappeared and the basis of the bargain should be disclosed and incorporated in the record."

MONTANA CASES:

In two cases, the Montana Supreme Court, when confronted with a defendant who had received the benefits of a plea bargain and later sought to withdraw his plea, held the defendant to his bargain.

Citing language from **State v. Nance,** 120 Mont. 152, 166, the Court in the recent case of **State v. Sattler,** __Mont.__, 33 St. Rep. 475 (1976) said:

"While this court does not generally encourage the making of bargains with persons charged with crime, it will not lend its assistance to an accused criminal in escaping the obligations of his agreement after accepting the benefits thereof."

State v. Morgan, 131 Mont. 58

Facts: D talked to county attorney without benefit of counsel and agreed to cooperate and plead guilty under the misapprehension that he would receive a suspended sentence. When he did not receive such a sentence D petitioned the court to withdraw his guilty plea.

Held: Conviction reversed and remanded to allow D to withdraw his plea under the general rule in Montana that a change of plea will be permitted if it fairly appears that the D was in ignorance of his rights and of the consequences of his act, or if influenced unduly and improperly either by hope or by fear in making it, or if it appears that the plea was entered under mistake or misapprehension. (Citing **State v. McAllister,** 96 Mont. 348)

The **Morgan** case seems to say that where a plea is entered under the hope or misapprehension that a certain sentence will be forthcoming and such a sentence is not imposed, the D must be allowed to change his plea. This case did not even contain evidence that any definite promises concerning sentencing had been made to the D, and it could easily be applied to require the court to allow a D to withdraw his guilty plea where definite plea bargaining promises had been made to him and not kept. The proposed legislation takes care of this problem by allowing the D the absolute right to withdraw his plea in the event the plea agreement is rejected by the court.

SEE ALSO: **State v. Griffin,** __Mont.__, 535 P2d 498, which illustrates the existing problem of not making plea bargains a part of the record. The D in **Griffin** claimed he had been promised a six (6) month jail sentence in return for a plea of guilty, but the record did not indicate any mention of such an agreement except by the D himself. Consequently the D was denied relief.

STATUTES OF OTHER JURISDICTIONS:

Federal Rules of Criminal Procedure, Rule 11 (e) (1) — (6), (f) & (g) 18 U.S.C.

Minnesota Rules of Criminal Procedure, Rule 15.04 M.S.A. 480.059

For an example of a State which has adopted plea agreement procedures in the form of a Supreme Court Rule see: Illinois Supreme Court Rule 402 1970), Ill. Rev. Stat. 1973, Ch. 110A § 402

SOURCE:

The primary source of the proposed bill is Rule 11 of the Fed. Rules Cr. Proc., since it is more closely in line with the standard involved here.

Section 3 of the proposed bill is drawn primarily from the Minnesota rules, Rule 15.04 Subd. 3 (2).

AMENDED & REPEALED SECTIONS OF THE R.C.M.:

The proposed bill contains all new material and is not in conflict with any existing sections.

SUGGESTED PLACEMENT & SECTION NUMBERING IN THE R.C.M.:

The proposed bill should be placed in the Montana Rules of Criminal Procedure, Title 95 Chapter 19 of R.C.M. (1947).

Existing section 95-1902 deals with pleas of guilty and it is suggested that the proposed bill be either added as an additional subsection of 95-1902, or that it be created as a new section to be numbered 95-1902.1.

APPENDIX G

COMPARATIVE ANALYSIS OF THE MONTANA CRIMINAL JUSTICE INFORMATION ACT PROPOSED BY THE CRIMINAL JUSTICE INFORMATION SYSTEMS AND ADVISORY COMMITTEE OF THE MONTANA BOARD OF CRIME CONTROL AND CHAPTERS FIVE AND SIX OF THE INFORMATION SYSTEMS TASK FORCE STANDARDS ON THE ADMINISTRATION OF PRIVACY AND SECURITY.

In the following comparison, the standard number of Chapter 6 of the Information System Task Force Report will be listed first followed by the corresponding section of the discussion draft proposed by the Criminal Justice Information System advisory committee. Then any difference in the two reports will be pointed out, concentrating on whether or not the intent of the standards of Chapter 6 of the Task Force is met by the proposed legislation. Also included, to facilitate rapid and convenient comparison of the standards and the proposed act, is a cross-reference table.

CROSS REFERENCE TABLE

TASK FORCE STANDARD NO.		CORRESPONDING SECTION OF PROPOSED ACT
6.1	(1)	8 & 6 (5) (d)
	(2)	9
	(3)	6 (5) (c)
6.2	(1)	5 (A) (2), 5 (C) (1) & (31), (6) (2) (a) & (b)
	(2)	9 (D) (3) & 2 (H)
	(3)	6 (3)
	(4)	2 (Q), 5 (A) (1) (b) & Alt. 4 (C) (1) (a)
	(5)	8 & 6 (5) (d)
	(6)	4 (2) (h)
6.3	(1)	7 (A), 7 (B), 2 (E) & 2 (B)
	(2) (a)	7 (B), 7 (C), & 7 (D)
	(b)	7 (D)
	(c)	7 (A)
	(d)	7 (G) (1)
	(e)	7 (E)
	(f)	7 (G) (2), 7 (H) & 7 (I)
	(g)	7 (I) (1), (2) & (3)
	(3)	7 (H), 7 (I), 9 (C) (4) & 9 (D) (4)
6.4	(1)-(3)	2 (I), 2 (C), 2 (Q), & 6 (4) (b)
5.8 & 5.9		4 (C) (1), Alt. 4 (C) (1), 2 (R)
5.10		Alt. 4 (C) (1) (b)
5.11		Alt. 4 (C) (1) (c) (1) and (2)
5.12		Alt. 4 (C) (1) (e) and (f)
6.5	(1)	6 (1) & 6 (3)
	(2)	6 (1), (2), (3) and (4)
	(3)	6
	(4) (a)	6 (5) (a)
	(b)	6 (3), 6 (5)
	(c)	6 (5) (d)
6.6	(1)	9 (C) (1), 6 (3) & 6 (5)
	(2)	6 (3) (d)
	(3)	6 (3) (d)
	(4)	6 (3) (d)
	(5)	9 (C) (1) and (2) & 9 (D) (5)
	(6)	6 (3) (d)
	(7)	9 (5) (d)
	(8)	none
	(9)	none
	(10)	6 (1) (b), 6 (3) & 5 (C) (2)
	(11)	9 (D) (6)
	(12)	6 (5) (b)
	(13)	6 (3) (b)
6.7	(1)	5 (D)
	(2)	5 (D)
	(3)	5 (D)
	(4)	5 (D)

STANDARD 6.1 — SECURITY AND PRIVACY ADMINISTRATION.

1.—STATE ENABLING ACT.

Section 8 of act gives penalties.

Section 6 (5) (d) of act also provides for disciplinary action against employees. Here the act appears to go farther than the standard in providing internal disciplinary sanctions. It may be a good idea to list such sanctions in the act, i.e., reprimand, suspension, withholding of salary etc.

2.—SECURITY AND PRIVACY BOARD.

Section 9 of act covers this.

Standard 6.1—requires 10 members, appointed for 5 year terms.

5 to be appointed by the governor, unaffiliated with the state's criminal justice system.

5 to be appointed by the attorney general, who are to be affiliated with the criminal justice system.

The board is to elect the chairman.

Section 9 of the act—requires 9 members, appointed for 4 year terms.

The governor is to appoint the members. The act also specifies courts, law enforcement, corrections, state and local government representatives instead of general criminal justice system members. The act states "to adequately represent", while the standard states "affiliated with, and representative of".

The standard calls for authority of the board to supervise and monitor information systems, this is handled adequately by the act in section 9 (C) (1) and (2), also 9 (D) (1) and (5).

The standard calls for enforcement by district courts, this is handled adequately by the act in 9 D (1) and (5).

The standard calls for authority of the board to adopt rules and regulations, this is covered by 9 (C) (3).

Finally, the act states that the governor is to appoint the chairman of the board, whereas the standard specifies the board will elect a chairman.

3.—TRAINING OF SYSTEM PERSONNEL AND PUBLIC EDUCATION.

Section 6 (5) (c) of the act provides for in-service training. But the act does not provide for attendance of required courses of instruction within a certain time. It simply states that annually each employee reviews and understands the nature and importance of security provisions. Perhaps this could be clarified under section 9 (C), (duties and responsibilities of the board).

Public education programs are not covered by the act either, this could also be clarified in section 9 (C).

STANDARD 6.2--ACCESS AND DISSEMINATION

1.—INFORMATION ACCESS.

Section 5 (A) (2) of the act states that all public criminal justice information is available to the public from the criminal justice agency. The act creates categories of public criminal justice information, and confidential criminal justice information and the case of the former, no limitations are placed on dissemination whereas the standard appears to place the requirements of the need and right to know on access to any type of criminal justice information to any agency or individual.

Section 5 (C) (1) of the act states that confidential criminal justice information is restricted to other criminal justice agencies. Section 5 (C) (3) Mentions that reasonable security must be taken in dissemination.

Section 6 of the act also addresses itself to the standard.

Section 6 (2) (a) states that equipment shall be under the direct control of a criminal justice agency.

Section 6 (2) (b) requires safeguards to be built into the system to prevent unauthorized inquiries.

2.—CERTIFICATION OF NON-CRIMINAL JUSTICE USERS.

Section 9 (D) (3) and Section 2 (H) of the act seem to cover this standard. But these sections don't cover non-criminal justice users, they only allow designation as a criminal justice agency and this only includes agencies which perform the administration of criminal justice under state or local law. Section 9 (C) (1) also could be considered as being in point, but the standard as a whole

should be stated somewhere with more specificity.

Perhaps another subsection in section 9 (C) should be added.

3.—FULL AND LIMITED ACCESS TO DATA.

Section 6 (3) of the act appears to cover this standard.

4.—ARREST WITHOUT CONVICTION.

Section 5 and section 2 of the act attempt to meet this standard.

Section 5 (A) (I) (b) of the act lists restrictions of public criminal justice information. In section 2 (Q) (5) "public criminal justice information" is defined as (a) initial offense reports, (b) initial arrest records, (c) bail records, and (d) daily jail occupancy rosters. All of the original documents are available to the public.

This illustrates the problems caused by the acts failure to establish a classificaiton system as required by the standards. The broad definitional categories of "public" and "confidential" criminal justice information seem wholly inadequate in this instance.

5.—ACCOUNTABILITY FOR RECEIPT, USE, AND DISSEMINATION OF DATA.

Section 8 and section 6 (5) (d) of the act cover this standard.

6.—CURRENCY OF INFORMATION.

Section 4 (2) (h) of the act covers this standard.

STANDARD 6.3—INFORMATION REVIEW.

1.—RIGHT TO REVIEW INFORMATION.

Section 7 (A) & (B) of the act meet this standard. The definition of criminal history record information, section 2 (E) seems to cover the exception of standard 6.3 (I), which excepts intelligence files from review. Section 2 (E) states that the definition does not include identification information obtained for purposes other than the administration of criminal justice. However, the definition of "administration of criminal justice" in section 2 (B) could be interpreted to include intelligence files. Standard 6.3 seems to also exclude certain investigative files from review, and while the act defines both "intelligence" and "investigative" information, section 7 (A) & (B) does not expressly exclude either from review. Perhaps it would be best to state that intelligence files are not reviewable.

2.—REVIEW PROCEDURES.

(a)—REVIEW SHOULD OCCUR ONLY WITHIN THE FACILITIES OF A CRIMINAL JUSTICE AGENCY. This standard seems to be implied throughout section 7— (B), (C), and (D) but is never actually so expressed. Perhaps, for clarification, it should be specifically stated.

(b)—REVIEW DURING REGULAR, DAYLIGHT HOURS. Section 7 (D) of the act meets this standard.

(c)—VERIFICATION OF IDENTITY. Section 7 (A) of the act meets this standard.

The only difference is that the standard (6.3 (2) (c)) states that each agency *should* require fingerprinting for identification of the individual, whereas section 7 (A) states it *may* do so.

(d)—RECORD OF REVIEW. Section 7 (G) (I) of the act meets this standard to some extent, but does not provide for appropriate forms approved and supplied by the board. Also the act does not provide for verification, by signature, of the accuracy of the reviewed criminal justice information.

(e)—SUMMARY OR COPIES OF INFORMATION. Section 7 (E) of the act meets this standard.

(f)—RIGHT TO CHALLENGE. Section 7 (G) (2) and (H) and (I) of the act meet this standard to some extent. But the act does not specify that the individual be informed of his right to challenge. Also, the act states that the individual "may request review by the head of the agency" (H), and in (H) (2) states that he has the right to challenge, but again does not state that he must be informed of this right, as standard 6.3 (2) (f) requires. Furthermore, as to the form the individual is required to submit concerning his objections, section 7 of the act does not provide that he must make his exceptions in good faith and that he sign an affirmance stating they are true to the best of the individual's knowledge and belief.

(g)—DETERMINATION OF ACCURACY OF EXCEPTIONS. Section 7 (I) (I), (2) and (3) of the act meet this standard.

3.—CHALLENGES TO INFORMATION.

Sections 7 (H) and (I) and sections 9 (C) (4) and (D) (4) of the act meet this standard.

STANDARD 6.4—DATA SENSITIVITY CLASSIFICATION.

Rather than the highly sensitive, confidential, and restricted classification system the standards require, the act establishes three definitional categories which do not meet the intent of standard 6.4.

Section 2 (I) of the act defines *criminal justice information* as information relating to criminal justice collected, processed or preserved by a criminal justice agency.

Section 2 (C) of the act defines *confidential criminal justice information* as (1) criminal investigative information, (2) criminal intelligence information, (3) fingerprints and photographs, (4) criminal justice information made confidential by law, and (5) any other criminal justice information not clearly defined as public criminal justice information. Section 2 (Q) of the act defines *public criminal justice information* as all information (1) made public by law, (2) court records and proceedings, (3) convictions and deferred prosecutions, (4) post conviction proceedings and status, (5) criminal justice agency originated reports and records, (6) information deemed necessary to secure public assistance in the apprehension of a suspect, and (7) statistical information. Then the act has a section on purging.

The act therefore appears to rely primarily on its definitions to meet the classification system specifications, this is not specific or clear enough. If the act went further and subdivided its definition of confidential criminal justice information into the three categories of Standard 6.4, it would be much clearer. Or the act could expand its Section 5 (C). As standard 6.4 specifies that each criminal justice agency should establish procedures in order to implement a sensitivity classification system, the proposed act fails to meet the intent of the standard. This failure of the proposed act to adhere to the establishment of a system of classification has resulted in a loss of flexibility on the part of the agency which originates the information. That is the act's broad definitional categories of "public" and "confidential" criminal justice information do not allow an agency to classify its own material depending on the particular circumstances surrounding the source, use, and sensitive nature of each individual piece of data or information.

Section 9 (D) (6) states that the board shall maintain the security of all confidential information, this seems to meet some of the requirements of Standard 6.4, but is also too general. None of the other requirements of 6.4 as to (3) (a) through (f) are addressed either. Also, section 6 (4) (b) of the proposed act states that all documents will be stamped as to their level of security—this would meet Standard 6.4, but in the act "level of security" is not provided for or defined.

The definitional categories of the proposed act are simply too broad and do not allow for the necessary special handling or classification of specific types of information. A good example of this is noted in the case of Standard 6.2's requirement that all information relating to an arrest which does not result in a conviction be placed under a "highly sensitive" classification to insure restricted access and maximum security—while in section 2 (Q) of the proposed act information relating to arrest without conviction would fall under the broad, general definition of public criminal justice information thus making it accessable to anyone under section 5 (A) in direct contravention of Standard 6.2 (4). It should also be noted that a classification system is vital to the concept of purging as set forth in Standard 5.8.

STANDARD 5.8—PURGED INFORMATION.

Standard 5.8 states that purging is the review of files and the removal of a file, or part of a file from active storage and dissemination. The effect of purging is to cleanse the active files of data found to be questionable. Further, it is frequently desirable under many circumstances that a certain degree of "forgiveness" be applied where a convicted offender has demonstrated change in remaining free from criminal activity for a substantial time. Rather than tailor this function to the needs of Montana's systems the bill merely avoids this highly controversial issue through 4 (C).

STANDARD 5.9—PURGING PROCEDURE.

Standard 5.9 requires that purging procedures be provided for of (a) arrest record information where the individuals arrest is not followed by formal charges, or prosecution was declined, (b) arrest record where acquitted, (c) felony convictions after ten years, following release, (d) misdemeanor convictions after five years following release, (e) inaccurate information. Standard 5.9 provides that records of offenders convicted of two or more crimes shall not be purged. This is not provided for in the act.

STANDARD 5.10—FREQUENCY OF PURGING.

This proposed act does not address this issue.

STANDARD 5.11—AVAILABILITY OF PURGED RECORDS.

The proposed act does not address this issue.

STANDARD 5.12—NOTIFICATION OF PURGING AND INDEXES TO PURGED RECORDS.

Standard 5.12 states that reference to the purged file should be limited to simple identifiers only, also that access to this index should be limited to authorized officials and employees. This proposed act does not deal with this matter.

STANDARD 6.5—SYSTEM SECURITY.

1.—PROTECTION FROM ACCIDENTAL LOSS.
Section 6 (1) of the proposed act adequately covers the standard and appears consistant with it.

2.—INTENTIONAL DAMAGE TO SYSTEM.
Sections 6 (1), (2), (3), and (4) of the proposed act adequately cover the standard and appear consistant with it.

3.—UNAUTHORIZED ACCESS.
This standard is also adequately covered by section 6 of the proposed act.

4.—PERSONNEL SECURITY.
(a) PREEMPLOYMENT SCREENING. Section 6 (5) (a) of the proposed act covers this standard.

(b) CLEARANCE ANNUAL REVIEW, SECURITY, Section 6 (3) and (5) of the proposed act cover this standard. Section 6 (5) (c) covers the training and the manual. (c) EMPLOYEE DISCIPLINE. Section 6 (5) (d) of the proposed act covers this standard. The act, however, left out the provision concerning the board's power to prohibit the dissemination of criminal history record information to an agency that had been found by the board to have willfully or repeatedly violated the requirements of the standard.

STANDARD 6.6—PERSONNEL CLEARANCES.

(1) Sections 9 (C) (1) and Sections 6 (3) & 6 (5) of the proposed act cover this standard. However, no express requirement is given in section 9, (C) (1) that the board insure that a personnel clearance system be implemented and complied with. This section of the act could perhaps be amplified to include this specific duty.

(2) Section 6 (3) (d) of the proposed act covers this standard.

(3) Section 6 (3) (d) of the proposed act also covers this standard.

(4) Section 6 (3) (d) of the proposed act cover this standard. Perhaps language being more particular as to the requirements of of right to know and need to know would be helpful.

(5) Section 9 (C) (1) & (2) and (D) (5) cover this standard.

(6) Section 6 (3) (d) covers this standard in part. It may be best to state the intent of this standard more specifically. It is never stated in the proposed act that certain persons, beside the board members, may be given blanket rights.

(7) Section 9 (D) (5) of the proposed act covers this standard as to the board members.

(8) Clearances given and full faith and credit given by one agency to clearance given by another agency are not really covered by the proposed act. Section 6 (3) mentions only software control.

(9) The proposed act does not cover this standard.

(10) Sections 6 (1) (b), 6 (3) and section 5 (C) (2) of the proposed act cover this standard.

(11) Section 9 (D) (6) of the proposed act seems to have been intended to meet this standard. It is too general however. The section only states that the board shall assure the security of all confidential information. Perhaps it should be specified that the board shall audit the clearances given, as this appears to be a specific requirement of the standard.

(12) Section 6 (5) (b) of the proposed act applies, but that section does not mention that only the lowest possible clearance should be given.

(13) Section 6 (3) (b) of the proposed act appears to cover this standard.

STANDARD 6.7—INFORMATION FOR RESEARCH.

1.—RESEARCH DESIGN AND ACCESS TO INFORMATION.

Section 5 (D) of the proposed act covers research. The provision of the act seem inadequate. For clarification, the first sentence of that section should include "entered into" after the word "agreement" on the third line.

2.—LIMITS ON CRIMINAL RESEARCH.

The requirement of a binding nondisclosure agreement with penalties for violations is not covered by the act.

3.—ROLE OF THE BOARD.

The last sentence of section 5 (D) is unclear. The standard seems to imply that the board insures that the research complies with standards to be set by the board. The proposed act does not make this clear.

It should be made clear that the completed product should also be checked by the board.

4.—DUTIES AND RESPONSIBILITIES OF THE HOLDING AGENCIES.

The same problem as in (3) exists here. The proposed act does not seem to follow the intent of the standard. It is again not made clear that the product of the research must be approved by the applicable agencies.

NOTES

NOTES

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